FINAL REPORT

TO THE
IDAHO
CRIMINAL JUSTICE COMMISSION'S

PUBLIC DEFENSE SUBCOMMITTEE

HOSKINS
LAW & POLICY GROUP
PLLC

JARED C. HOSKINS

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PREFACE

In April of 2011, the Idaho Criminal Justice Commission's Public Defense Subcommittee ("the Subcommittee") contracted with Hoskins Law & Policy Group, PLLC and its sole and managing member, Jared C. Hoskins, to serve as the Subcommittee's Contract Staff Attorney. The Contract Staff Attorney was hired to support the work of the Subcommittee through research, data collection, briefing papers, and reform recommendations to be considered by the Idaho Criminal Justice Commission ("the Commission" or "the ICJC"). Upon the natural expiration of the contract in March of 2013, the Contract Staff Attorney provided his research to the Subcommittee in the form of this Final Report to the Subcommittee.

The findings and conclusions of the research contained herein were either a precursor to or follow-up on discussions held in Subcommittee meetings. Although much of the substance of the Public Defense Subcommittee's Recommendations was informed by this research, not all of the research was adopted by the Subcommittee. In other words, while over the course of three years myriad reform ideas were discussed in Subcommittee meetings, consensus was not always reached and recommendations on certain issues were never formulated. As such, the conclusions of the research regarding some of these unresolved issues should not be construed as the expressed opinion of the Subcommittee. Rather, such research should be used as an informational tool and, perhaps, as a starting point for discussion.

FINAL REPORT
TO THE
SUBCOMMITTEE
BY
JARED C. HOSKINS

BACKGROUND:
THE SIXTH AMENDMENT
RIGHT TO COUNSEL

The Sixth Amendment of the United States Constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."[1] This constitutional right reflects the notion that, in an adversarial system designed to seek truth and justice, there must be capable counsel for the state and the accused.

> A strong public defense system is a central component of an effective crime-fighting policy to shield poor citizens and, indirectly, all citizens against abuses by the state. It also facilitates a smoother operating justice system and, in so doing, allows the courts to respond effectively to growing caseloads. A strong public defense system promotes the legitimacy of the justice system—legitimacy necessary to maintain public support.[2]

As noted by the U.S. Supreme Court in *Gideon v. Wainwrigh*t, the "right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[3]

While the Bill of Rights, including the Sixth Amendment, only apply directly to the U.S. federal government, the right to counsel has been deemed to be a fundamental safeguard of liberty which is equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.[4] As other rights that are fundamental and essential to a fair trial, the vindication of the Sixth Amendment right to counsel is a state obligation. Indeed, Idaho has explicitly provided for this right in its own body of law.[5]

The constitutional right to counsel was initially interpreted in *Gideon* to apply only when the accused was charged with a felony.[6] However, since *Gideon*, the Sixth Amendment right to counsel has been held to attach not only

[1] U.S. Const. amend. VI.
[2] Tony Fabelo, *Papers from the Executive Session on Public Defense: What Policymakers Need to Know to Improve Public Defense Systems*, 2 (Harvard University, John F. Kennedy School of Government 2001).
[3] 372 U.S. 335, 344 (1963).
[4] *Id*. at 341.
[5] Idaho Const. art I, § 13; Idaho Code §§ 19-801, 852.
[6] 372 U.S. at 345.

in appellate cases[1] and juvenile delinquency proceedings[2] but also when a defendant is charged with a misdemeanor that results in a sentence of confinement. In *Argersinger v. Hamlin*, the Supreme Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[3]

A short time after, the Supreme Court clarified this position in *Scott v. Illinois*[4] and posited that the right to counsel does not necessarily attach when imprisonment is merely an authorized penalty.

> The central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.[5]

Thus, if a defendant is charged with a crime that carries with it, say, a maximum punishment of six months of jail, his or her right to counsel is triggered only and if a term of imprisonment is imposed.

In *Alabama v. Shelton*, the Supreme Court further held that "a suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense."[6] Thus, for Sixth Amendment purposes, the imposition of a suspended jail sentence is the equivalent of imposition of an actual jail sentence. Simply suspending a jail sentence with the expectation that it may subsequently be imposed upon violation of probation will not avoid the Sixth Amendment responsibility.

Although it has not been explicitly addressed by the Supreme Court, circuit courts have distinguished between the imposition of a suspended sentence on one hand and the imposition of stand-alone probation on the other.[7]

> A suspended sentence is conceptually different from a sentence of probation. If a defendant receives a suspended sentence, he is sentenced to a term of imprisonment that is suspended . . . . Suspended sentences are usually imposed in conjunction with probation so that if a defendant commits another crime or violates a condition of probation, his suspended sentence is activated . . . . If a defendant receives only a sentence of

[1] *Douglas v. California*, 372 U.S. 353 (1963); *Halbert v. Michigan*, 545 U.S. 605 (2005).
[2] *In Re Gault*, 387 U.S. 1 (1967).
[3] *Id.*
[4] 440 U.S. 367 (1979).
[5] *Id.* at 372-73.
[6] 535 U.S. 654, 662 (2002).
[7] *U.S. v. Perez-Macias*, 335 F.3d 421, 425 (5th Cir. 2003); *see also U.S. v. Pollard*, 389 F.3d 101, 103 (4th Cir. 2004).

> probation, he is sentenced to community release with conditions; he does not receive a sentence of imprisonment.[1]

Unlike a suspended sentence, therefore, a sentence of stand-alone probation does not trigger a Sixth Amendment right to counsel in and of itself.

In addition to enumerating the types of cases where the right to counsel attaches, the Supreme Court has established that the right to counsel means the right to the effective assistance of counsel.[2] According to *Strickland*, an ineffective assistance of counsel claim requires the defendant to show that his or her counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Simply put, *Strickland* requires the defendant to show (a) defective performance and (b) prejudice.[3]

What is more, one's Sixth Amendment right to the effective assistance of counsel "guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings, including the plea bargaining stage."[4] Indeed, in *Missouri v. Frye*, the Supreme Court recently reiterated the position established in *Hill v. Lockhart*[5] and *Padilla v. Kentucky*[6] that plea bargaining constitutes a "critical stage" of litigation for purposes of the Sixth Amendment right to the effective assistance of counsel.[7]

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.[8]

In *Frye*, the defendant sought post-conviction relief in state court, alleging that his counsel's failure to inform him of an earlier plea offer denied him the effective assistance of counsel because he later pleaded guilty and received a punishment harsher than what would have been recommended in the earlier plea. The defendant later testified that he would have pleaded guilty pursuant to the earlier offer had he known about it. The Court maintained that ineffective assistance of counsel claims in this context are governed by the two-part test set forth in *Strickland*.[9]

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[1] *Perez-Macias*, 335 F.3d at 426-427.
[2] *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984).
[3] *Id*.
[4] *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (quoting *United States v. Wade*, 388 U.S. 218, 227–228 (1967)).
[5] 106 S.Ct. 366 (1985).
[6] 130 S.Ct. 1473 (2010).
[7] *Missouri v. Frye*, 132 S.Ct. 1399 (2012).
[8] *Id*. at 1407.
[9] *Id*. at 1405 (citing *Hill*, 106 S.Ct. at 366).

With regard to the "defective performance prong" of the *Strickland* analysis, the Court specifically found that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused" and that failure to do so constitutes defective performance.[1] As to *Strickland's* "prejudice prong," the Court further held that:

> to show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. . . . It is [also] necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.[2]

In other words, for purposes of establishing prejudice in the *Strickland* analysis in the plea bargaining context, the defendant must show a reasonable probability that (i) he or she would have pleaded guilty pursuant to the undisclosed plea offer; (ii) neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented; and (iii) the end result would have been more favorable.

The Court ultimately determined that, though the defendant had shown there was a reasonable probability he would have accepted the prior, undisclosed plea offer, the Court of Appeals did not require him to show there was a reasonable probability it would have been adhered to by the prosecution and accepted by the trial court.[3] The Court noted that "whether the prosecution and trial court are required to do so is a matter of state law" and remanded the case to the Missouri Court of Appeals to determine as much.[4]

Though, as stated by the Court in its decision, *Frye* does not alter the previously established principle that defendants have a Sixth Amendment right to the effective assistance of counsel during plea bargaining, it does affirmatively establish that failure to communicate formal, favorable offers from the prosecution falls below an objective standard of reasonableness. Thus, the practical consequence of *Frye* is that the effective assistance of

[1] *Frye*, 132 S.Ct. at 1408.
[2] *Id*. at 1409.
[3] *Id*. at 1411.
[4] *Id.*

counsel requires attorneys to specifically communicate formal plea offers to defendants.[1]

Taken together, it is apparent that the state has a weighty obligation. Counsel must be provided in felony cases, misdemeanor cases when a jail sentence is imposed—suspended or otherwise—and certain appellate and juvenile proceedings. What is more, the state is obliged to provide the effective assistance of counsel at all critical stages, even in the pre-trial, plea negotiation context where a vast majority of criminal proceedings are disposed.

In response to *Gideon*'s initial constitutional mandate, Idaho delegated this responsibility of providing counsel to the counties in 1967.[2] While a state may, indeed, delegate this weighty obligation, "it must do so in a manner that does not abdicate the constitutional duty it owes to the people."[3] The state is obliged to ensure that the counties are capable of meeting the obligations and that counties actually do so. If the counties cannot meet the delegated responsibilities, the state—as the original obligor—must step in.

[1] Query whether *Frye* significantly alters counsel's duties. See the commentary to Idaho Rules of Professional Conduct, Rule 1.4: "A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer." Also, In Idaho, the State is free to withdraw from a plea agreement until the defendant actually enters a guilty plea and the State's obligations do not ripen until that time. *See e.g. State v. Pierce*, 249 P.3d 1180, 1183 (Idaho App. 2011). Thus, prejudice may be harder to establish.

[2] Idaho Code § 19-859.

[3] *Claremont School Dist. v. Governor*, 147 N.H. 499, 513 (N.H. 2002).

HISTORY OF THE PUBLIC DEFENSE SUBCOMMITTEE

In 2007 the Idaho State Appellate Public Defender's Office ("SAPD") approached the ICJC about conducting a study of Idaho's trial-level indigent defense system.[1] The ICJC, with representatives from all 3 branches of government, was created in 2005 to reach balanced solutions on critical issues facing Idaho's criminal justice system with research and evidence-based practices.[2] The ICJC decided to contract with the NLADA to conduct the study with funds granted by the Open Society Institute and the Juvenile Justice Commission.

The NLADA report was released in 2010 and it suggested that Idaho is not adequately satisfying its Sixth Amendment obligations. According to the report, "none of the public defense systems in the sample counties are constitutionally adequate."[3] The report further noted that:

> by delegating to each county the responsibility to provide counsel at the trial level without any state funding or oversight, Idaho has sewn a patchwork quilt of underfunded, inconsistent systems that vary greatly in defining who qualifies for services and in the level of competency of the services rendered.[4]

In addition to commissioning the NLADA report, the ICJC formed the Subcommittee in 2009 to develop recommendations for improvement of Idaho's public defense system.[5] From December of 2009 until January of 2013, the Subcommittee committed itself to that task and its efforts have since yielded four recommendations for the Idaho Legislature.

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[1] See Subcommittee Meeting Minutes, December 8, 2009, p. 1.

[2] The ICJC is composed of members from the Idaho Department of Corrections, Idaho Sheriffs' Association, Office of Attorney General, Senate, House of Representatives, Idaho Supreme Court, district courts, magistrate courts, Idaho State Police, Idaho Department of Juvenile Corrections, Commission of Pardons and Parole, Department of Health and Welfare, State Appellate Public Defender, Idaho Prosecuting Attorneys Association, Chiefs of Police Association, Idaho Association of Counties, Idaho Commission on Hispanic Affairs, Office of the Governor, Department of Education, Office of Drug Policy, and the public.

[3] *The Guarantee of Counsel: Advocacy and Due Process in Idaho's Trial Courts,* National Legal Aid & Defender Association, 2010, p. 3.

[4] *Id.* at iii.

[5] The Subcommittee is composed public defenders, prosecutors, judges, and representatives from the Idaho Association of Counties, Idaho Supreme Court, Office of the Attorney General, Idaho State Bar, State Appellate Public Defender, Department of Corrections, Juvenile Justice Commission, Idaho Department of Juvenile Corrections, Senate, and House of Representatives.

RESEARCH AND RECOMMENDATIONS

A.
REVISION OF CHAPTER 8, TITLE 19, IDAHO CODE

The first piece of legislation recommended by the Subcommittee provides uniform eligibility requirements for the appointment of counsel at public expense. The Subcommittee has observed significant variance in the administration of public defense systems from county-to-county and even from courtroom-to-courtroom. The Subcommittee has agreed that the public defense services provided by one county should resemble the services provided in another and that there should be semblance in—at least—four areas: substantive eligibility, financial eligibility, recoupment, and data reporting. In addition to changing some antiquated language and removing a few erroneous statutory references, the Subcommittee's proposed amendments to Chapter 8, Title 19, Idaho Code, seek this semblance.

1. TECHNICAL CHANGES

First, the Subcommittee determined that it ought to engage in some statutory "housekeeping" while proposing amendments to Chapter 8, Title 19. As mentioned above, the Idaho Code provisions regarding the provision of public defense services have changed very little since their inception. This is illustrated by the fact that those entitled to counsel at public expense are referred to as "needy persons" in Idaho Code. The Subcommittee unanimously decided that the term should be replaced with, "indigent person."

The Subcommittee also found that certain statutory cross references have either been repealed or seem inappropriate. For instance, Idaho Code § 19-852 still references § 18-214, the provision which used to set forth the procedures for review of the continued commitment and conditional release of persons acquitted by reason of mental illness. Section 18-214 was repealed in 1982 along with the defense of mental illness in criminal actions.[1] Yet, the reference to § 18-214 was not stricken from § 19-852. The Subcommittee's first piece of legislation makes this correction.[2]

The Subcommittee also questioned §§ 19-852 and 853's reference to § 66-409. It makes little sense for §§ 19-852 and 853, provisions setting forth the situations where a person is entitled to counsel, to reference § 66-409. Section 66-409 provides: "the head of any facility licensed under state law is authorized to admit for observation, diagnosis, care or treatment any developmentally disabled person for services provided by that facility." There is no reference to the right to counsel or the appointment of counsel.

It seems more appropriate for §§ 19-852 and 853 to refer to §§ 66-404 and 406. Section 66-404 states: "upon filing of a petition, the court shall set a date for a hearing [and] *appoint an attorney to represent* the respondent in the

[1] 1982 Idaho Session Laws, ch. 368, § 1, p. 919.
[2] See Appendix, p. 3.

proceedings unless the respondent has an attorney" (emphasis added). Also, section 66-406 provides that the court shall "give written notice of the time and place of the hearing together with . . . notice of the respondent's *right to be represented by an attorney, or if indigent, to be represented by a court-appointed attorney*" (emphasis added).

It is unclear why §§ 19-852 and 853 currently contain the erroneous reference. It was thought that § 66-409 may have been re-designated at some point and that the references in §§ 19-852 and 853 were simply overlooked in engrossment. Yet, § 66-409 was never re-designated. Also, a review of the committee meeting minutes and some of the supporting documents in the record from the 1982 legislative session reveals that there may have simply been a typographical error. For example, the minutes from the Judiciary and Rules Committee meeting on January 25, 1982 state, in pertinent part:

> Steve Anderson [Executive Director of Idaho State Council on Developmental Disabilities] stated that RS7643 [SB 1283] proposes to replace several existing statutes pertaining to mentally retarded and developmentally disabled persons in Idaho as follows: . . . raise the due process protections afforded to mentally retarded and developmentally disabled individuals *in involuntary commitment proceedings* (emphasis added).

Also, a written copy of Mr. Anderson's testimony at the meetings states:

> Sections 3 and 4 [of SB 1283] propose simple additions to the Criminal Procedures statutes contained in Chapter 8, Title 19 of the Idaho Code, for the purpose of extending right to counsel provisions to *persons who are committed as a result of developmental disability* (emphasis added).

It appears that the authors meant to refer to §§ 66-404 and 406. Because §§ 66-404 and 406 require a person to be provided with counsel when being appointed a conservator and when being committed to the Department of Health and Welfare respectively, §§ 19-852 and 853 were amended by the Subcommittee to reference those sections.[1]

2. SUBSTANTIVE ELIGIBILITY

Again, the Subcommittee has observed that there is significant variance in determining eligibility for the appointment of counsel. In terms of substantive eligibility, some Idaho courts—expecting that a jail sentence will not ultimately be imposed—do not appoint counsel whereas other courts appoint counsel if the applicable criminal statute provides for the mere

[1] See Appendix, pp. 3-4.

possibility of a jail sentence. To address this variance, the Subcommittee's proposed amendments to §19-851 redefine the term, "serious crime," to include any offense the penalty for which includes the mere possibility of confinement incarceration, imprisonment, or detention in a correctional facility regardless of whether actually imposed.[1]

As discussed in detail above, a person is constitutionally entitled to counsel if a jail sentence is ultimately imposed or suspended. In other words, a person may not be sentenced to incarceration or have his or her suspended sentence imposed without having been previously availed of the right to counsel. The proposed amendments eliminate the distinction between felonies and misdemeanors and specifically clarify that the *possibility* of confinement—not the imposition of confinement—triggers substantive eligibility for the appointment of counsel. Thus, the proposed changes to § 19-851 will avoid ambiguity and will ensure that all Idahoans are appointed counsel for the same offenses in conformance with constitutional demands.

In addition to clarifying what crimes trigger the right to counsel, the Subcommittee has accounted for waiver of this right as well. According to NLADA's report, Idaho "jurisdictions get around their constitutional obligation to provide lawyers in misdemeanor cases in a myriad of [*sic*] ways, including accepting uninformed waivers of counsel."[2] The Subcommittee considered amending § 19-857 to require all waivers to be in writing and to ensure that other constitutional requirements are satisfied. Instead, the Subcommittee decided to strike some superfluous language and to maintain the court's ability to allow waiver so long as the court "finds *of record* that [the defendant] has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law" (emphasis added).[3] The Subcommittee concluded that, instead of amending the statutes, Idaho Criminal Rule 5 and Idaho Misdemeanor Rule 6 could be amended to account for a uniform written waiver as well as constitutional demands.

The issue faced by the Subcommittee was the length to which Idaho trial courts must go in ensuring that defendants waive their right to counsel in conformance with constitutional and statutory requirements. The Sixth Amendment guarantees that a defendant has an independent constitutional right to waive his or her right to the assistance of counsel and proceed *pro se* when he or she voluntarily and intelligently elects to do so.[4] Though *Faretta v. California* did not explicitly spell out what exactly constitutes a waiver made voluntarily and intelligently, it did make some suggestions. "Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation," suggested the Court, "he *should* be made aware of the dangers and disadvantages of self-

[1] See Appendix, p. 3.
[2] *The Guarantee of Counsel: Advocacy and Due Process in Idaho's Trial Courts,* National Legal Aid & Defender Association, 2010, p. vi.
[3] See Appendix, p. 6; See Subcommittee Meeting Minutes, July 9, 2012, p. 4.
[4] *Faretta v. California,* 422 U.S. 806, 835 (1975); *State v. Hoppe*, 88 P.3d 690, 694 (2003); *State v. Lankford*, 781 P.2d 197, 202 (1989); *State v. McCabe*, 620 P.2d 300, 302 (1980).

representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"[1] In commenting on whether the defendant did waive his right to counsel knowingly and intelligently in that case, the Court noted that the record affirmatively showed he was literate, competent, understanding, and that he was exercising his own free will.[2]

In *Patterson v. Illinois*, the Supreme Court elaborated on "the dangers and disadvantages of self-representation" to which *Faretta* referred.[3] The Court noted that "counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of voir dire, examine and cross-examine witnesses effectively . . . [and] object to improper prosecution questions."[4] Before a defendant can proceed to trial *pro se*, warnings of these pitfalls must be "rigorously" conveyed.[5]

As opposed to looking at waiver in the trial context, in *Iowa v. Tovar*, the U.S. Supreme Court addressed the extent to which a trial judge, *before accepting a guilty plea* from an uncounseled defendant, must elaborate on his or her Sixth Amendment right to counsel.[6] Specifically, the Court addressed whether, in order for the waiver to be made knowingly and intelligently, the defendant must be: (1) warned that waiving the assistance of counsel in deciding to plead guilty entails the risk that a viable defense will be overlooked; and (2) "admonished" that by waiving his or her right to an attorney the defendant will lose the opportunity to obtain an independent opinion on whether it is wise to plead guilty under the facts and applicable law.[7] The Court held that neither warning is mandated by the Sixth Amendment.[8] "The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea."[9]

In Idaho it has been held that waiver must be made voluntarily.[10] Additionally, in the trial context, Idaho case law mandates that the defendant "be aware of the nature of the charges filed against him and the possible penalties flowing from those charges, as well as the dangers and disadvantages of self-representation."[11] The district court must be satisfied that the defendant "understood the inherent risks involved in waiving the right to counsel."[12]

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[1] *Faretta*, 422 U.S. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)) (emphasis added).
[2] *Id*.
[3] 487 U.S. 285 (1988).
[4] *Id*. at 299.
[5] *Id* at 298.
[6] 541 U.S. 77 (2004).
[7] *Id*.
[8] *Id*. at 81.
[9] *Id*.
[10] *State v. Dalrymple,* 144 Idaho 628 (2007).
[11] *State v. Lovelace,* 140 Idaho 53, 64 (2003).
[12] *Dalrymple*, 144 Idaho at 634.

Several Idaho cases have addressed the standards of a valid waiver of counsel and found that the defendants were sufficiently availed of their Sixth Amendment right to counsel prior to its waiver. In *State v. Dalrymple*, the Court found that the Defendant knowingly, intelligently, and voluntarily waived his right to counsel in that he was advised of both the advantages of retaining a lawyer at trial and the disadvantages of representing himself and also that he would be subject to cross-examination at trial.[1] The trial court had also confirmed that the defendant had a GED and went to a year of college. The Defendant also testified at the pretrial hearing that he had never been diagnosed or treated for a mental illness and that no one advised or threatened him not to have a lawyer.

In *State v. McCabe*, the Idaho Supreme Court found that the defendant's election to waive his right to counsel was made willingly, competently, and intelligently where the trial court repeatedly sought to dissuade the defendant from his decision to waive counsel, advised him of the dangers of attempting to represent himself and present his own defense, and where the defendant indicated he was adamant in his decision.[2]

In *State v. Lankford*, the Idaho Supreme Court referenced *United States v. Harris*,[3] in which the court held that the trial court must discuss with the defendant, in open court, whether his or her waiver is knowingly and intelligently made with an understanding of the charges, the possible penalties, and the dangers of self-representation.[4] The *Lankford* Court went on to find that the defendant in that case did knowingly and intelligently waive his right to counsel because the trial court warned the defendant of the hazards he would encounter, that he had an insufficient background to examine the witnesses, and that he would be held to the Idaho Rules of Evidence if he elected to proceed on his own behalf.[5]

In *State v. Anderson*, the Idaho Supreme Court held that, in verifying the Defendant's age, familiarity with the English language, education, mental state, and the complexity of the crime, the trial court satisfied the constitutional, case law, and statutory requirements for effective waiver of counsel.[6]

Although the Idaho Supreme Court, in *State v. Weber*,[7] held that a prior misdemeanor DUI conviction is not subject to collateral attack in a subsequent felony DUI proceeding on the basis that the defendant's previous *guilty plea* was not made knowingly, intelligently, and voluntarily, taking the time to ensure a defendant actually knows what he is doing before accepting his waiver and allowing him to plead guilty without counsel or proceed to trial *pro*

[1] 144 Idaho at 634.
[2] 101 Idaho 727, 729 (1980).
[3] 683 F.2d 322, 324–325 (9th Cir.1982).
[4] 116 Idaho 860, 865 (1989).
[5] *Id*. at 866.
[6] 144 Idaho 743, 747 (2007).
[7] 140 Idaho 89 (2004).

se protects the criminal justice system from unnecessary appeals, post-conviction actions, and retrials.[1]

As such, the Subcommittee has recommended that I.C.R. 5 and I.M.C.R. 6 be amended so that all Idaho district and magistrate courts uniformly follow a particular procedure when waiving counsel in both the guilty plea and trial contexts.[2] A written form waiver[3] that includes the various factors[4] mandated and/or suggested by the Sixth Amendment, state and federal court cases interpreting the Sixth Amendment, and Idaho statutory requirements would promote a uniform and thorough waiver practice throughout the state that is documentable and verifiable on a case-by-case basis.

3. FINANCIAL ELIGIBILITY

In addition to variation in substantive eligibility for the appointment of counsel, the Subcommittee has similarly learned that there is variance in terms of who financially qualifies for appointment of counsel. Currently, "the determination of whether a person covered by section 19-852, Idaho Code, is a needy person shall be deferred until his first appearance in court. Thereafter, the court concerned shall determine, with respect to each proceeding, whether he is a needy person."[5] While the current statute enumerates several factors that courts may consider, there is no uniform standard of financial eligibility and courts make their determinations on a case-by-case basis. "In determining whether a person is a needy person and in determining the extent of his inability to pay, the court concerned may consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents."[6]

The Subcommittee's proposed amendments will require the courts to presume a person is financially eligible for appointment of counsel if certain objective factors are present. Under the proposed amendments, unless the determination is contrary to the interests of justice, courts would be required to find a person financially eligible for appointment of counsel if he or she (a) has an income within 187%[7] of the federal poverty guidelines; (b) receives, or if

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[1] *The Guarantee of Counsel: Advocacy and Due Process in Idaho's Trial Courts,* National Legal Aid & Defender Association, 2010, p. 47.
[2] See Appendix, pp. 28-32; See also Subcommittee Meeting Minutes, October 26, 2010, p. 4.
[3] See Appendix, pp. 29-30.
[4] See Figure 1, Appendix, p. 48.
[5] Idaho Code § 19-854(a).
[6] Idaho Code § 19-854(b).
[7] Prior to RS print hearing, the proposed amendments were changed to reflect 187% instead of 250%. See, *e.g.*, Mont. Code Ann. § 47-1-111(3) ("An applicant is indigent if the applicant's gross household income, as defined in 15-30-2337, is at or less than 133% of the poverty level set according to the most current federal poverty guidelines updated periodically in the Federal Register by the United States department of health and human services under the authority of 42 U.S.C. 9902(2)"). See also La. Rev. Stat. Ann. § 15:175 ("A person will be deemed 'indigent' who is unable, without substantial financial hardship to himself or to his dependents, to obtain competent, qualified legal representation on his own. 'Substantial financial hardship'

his or her dependents receive, public assistance; or (c) is serving a sentence in a correctional facility or housed in a mental health facility.[1] The "contrary to the interests of justice" exception would allow a court to decline to appoint counsel in the rare situation that, say, a millionaire is serving a sentence in a correctional facility or the not-so-rare situation where a wealthy individual's child receives benefits due to a developmental disability. Although these individuals would technically satisfy the statutory presumptions, the court could find that appointment of counsel would be contrary to the interests of justice and decline to appoint counsel.

Furthermore, the courts would still be afforded the discretion to find other individuals financially eligible. Although a person may not satisfy the statutory presumptions, the court may consider factors such as income, property owned, outstanding obligations, the number and ages of dependents, and the cost of bail in making its determination.

The Subcommittee has also acknowledged that requiring a person to complete a financial affidavit in order qualify for appointment implicates his or her Fifth Amendment privilege against self-incrimination. The Fifth Amendment privilege against compulsory self-incrimination limits the use of evidence obtained illegally by law enforcement officers.[2] In *Miranda*, the Supreme Court held that:

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[3]

In other words, prior to questioning, a person must be warned that: (a) he or she has a right to remain silent; (b) that any statements made may be used as evidence against him or her; and (c) that he or she has a right to an appointed attorney.[4]

Soon thereafter, in *Simmons v. United States*, the Supreme Court found that the Fifth Amendment privilege applied by extension to statements made during pretrial suppression hearings.[5] There, the defendant sought to suppress evidence that was obtained illegally. In order to do so, however, he had to establish standing, which required him to acknowledge that a particular

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is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, resides in public housing, or earns less than two hundred percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial financial hardship if he or she is currently serving a sentence in a correctional institution or is housed in a mental health facility").

[1] See Appendix, p. 5.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] *Id.* at 445.

[4] *Id.*

[5] 390 U.S. 377 (1968).

suitcase in question belonged to him. Because the defendant's testimony regarding ownership of the suitcase was an "integral part" of his Fourth Amendment exclusion claim, he was forced to "give that testimony only by assuming the risk that the testimony would later be admitted against him at trial."[1]

"It seems obvious," declared the Court in *Simmons*, "that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim."[2] To solve the unique dilemma of having to choose between one's Fourth Amendment and Fifth Amendment rights, therefore, the Court deemed statements made during pretrial suppression hearings—like *incommunicado* statements in *Miranda*—inadmissible at trial on the issue of guilt.[3]

By analogy, courts have since extended the Fifth Amendment privilege to statements made on indigency affidavits.[4] In *Hardwell*, for instance, as opposed to the "*incommunicado* interrogation of individuals in a police-dominated atmosphere" at issue in *Miranda*, the court addressed whether requiring an indigent defendant to execute an affidavit in order to be appointed counsel implicates the Fifth Amendment privilege against compulsory self-incrimination.[5] There, the defendant was charged with money laundering and a key element of the charge required the state to show that the defendant lacked a legitimate source of income. To establish this necessary element, the prosecution introduced the defendant's indigency affidavit—which disclosed that he had little-to-no income—as substantive evidence of the fact that he did not have a legitimate source of income.

As a threshold matter, it could be doubted whether a person is "compelled," for *Miranda* purposes, to incriminate him or herself on an indigency affidavit because the decision to apply for appointment of counsel is voluntary. As an "abstract matter," of course, this may very well be true.

> A defendant is 'compelled' to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension

[1] *Id*. at 391.
[2] *Id*. at 392-393.
[3] *Id*. at 392.
[4] See *U.S. v. Hardwell*, 80 F.3d 1471 (10th Cir. 1996); *United States v. Hitchcock*, 992 F.2d 236 (9th Cir. 1993); *United States v. Pavelko*, 992 F.2d 32 (3d Cir. 1993); *United States v. Gravatt*, 868 F.2d 585 (3d Cir. 1989); *United States v. Sarsoun*, 834 F.2d 1358 (7th Cir. 1987).
[5] *Miranda*, 384 U.S. at 445.

> is created . . . . In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.[1]

Similarly, a person is "compelled" to execute an indigency affidavit only in the sense that, if he or she refrains from executing it, he or she will have to forego the benefit of court-appointed counsel. Yet, as with statements made in pretrial suppression hearings, execution of an indigency affidavit may require a person to choose between the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. In *Hardwell*, the court ultimately concluded that because the government used the defendant's indigency affidavit and other statements he made to establish eligibility for appointed counsel to prove guilt at trial, his Fifth Amendment right against self-incrimination was violated.[2]

While *Hardwell* clearly elucidates the constitutional parameters of the use of indigency affidavits as substantive evidence of guilt in the government's case in chief, it may be questioned how, if at all, such affidavits may be used by the government. For instance, may the government admit evidence that was derived from the information contained on an indigency affidavit as substantive evidence of guilt in the case in chief or other cases? Or, may an indigency affidavit be used for impeachment purposes?

With regard to derivative evidence, the Fifth Amendment clearly applies not only to any disclosures that could be used against a person in *any* proceedings—civil or criminal, administrative or judicial, investigatory or adjudicatory—but it also applies to any disclosures that could *lead* to other evidence that might be so used.[3]

> The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.[4]

Thus, the government may not, for instance, use information derived from an indigency affidavit—such as the existence of a source of income or assets—for use in its case in chief or in other proceedings.

While use of information contained on an indigency affidavit, like statements made in the pretrial suppression context, is severely restricted due to the unique constitutional dilemma thrust upon the declarant, its use is not categorically prohibited. In *Harris v. New York*, the Supreme Court held that statements made by a defendant during an initial investigation, although later deemed inadmissible as substantive evidence of guilt under the Fifth

[1] *Simmons*, 390 U.S. at 393-394.
[2] *Hardwell*, 80 F.3d at 1484.
[3] *Kastigar v. U.S.*, 406 U.S. 441 (1972); *State v. Curless*, 44 P.3d 1193 (Idaho App. 2002).
[4] *Hoffman v. U. S.*, 341 U.S. 479, 486 (1951).

Amendment, could be used for impeachment purposes if the defendant chooses to testify.[1]

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury . . . . Having voluntarily taken the stand, [a defendant is] under an obligation to speak truthfully and accurately.[2]

By analogy, the court in *Phillip v. State* subsequently concluded that, although information from an indigency affidavit may not be used as substantive evidence of guilt, use for impeachment purposes does not implicate the Fifth Amendment.[3]

Under penalty of perjury, a person could potentially be compelled to disclose information that would be incriminating, such as the existence of, say, illegal income or assets. When a person is compelled to make such disclosures in order to avail him or herself of the Sixth Amendment right to counsel, he or she faces the quandary of having to choose exclusively between the protections provided by the Fifth and Sixth Amendments. Yet, an in-depth inquiry as to one's indigence by the court—particularly by way of an indigency affidavit—serves the interests of justice by limiting appointment of counsel to those who are truly financially qualified. Perhaps more importantly, the use of written, uniform indigency affidavits discourages the arbitrary appointment of counsel and promotes principles of equality. In other words, indigency affidavits prevent "justice by geography" and ensure that individuals are equally availed of their constitutional rights within a particular jurisdiction. As a practical matter, therefore, policymakers face the quandary of reconciling Fifth Amendment directives with the practical concerns of limiting the appointment of counsel to the truly indigent.

Fortunately, policymakers are not without guidance and precedent. Generally speaking, the dilemma can be solved in one of two ways: retroactively or prospectively. As discussed above, the Constitution protects individuals retroactively in the sense that convictions may be challenged on the grounds that reversible error occurs when trial courts use information from an indigency affidavit in contravention of the Fifth Amendment. If information from an indigency affidavit is so used, the defendant has a colorable Fifth Amendment claim without regard to the existence or nonexistence of statutory protections. As such, policymakers could choose to do nothing and simply rely on astute criminal defense attorneys to vindicate their clients' Fifth Amendment rights retroactively on a case-by-case basis.

After all, it could certainly be conceded that the Fifth Amendment implications of indigency applications are rare and, perhaps, even speculative. Indeed, some courts have held that a defendant's Fifth Amendment rights are

[1] *Harris v. New York*, 401 U.S. 222 (1971).
[2] *Id*. at 225.
[3] 225 P.3d 504 (Wyo. 2010).

not implicated unless and until the government attempts to use the information at trial.[1] However, some courts have suggested—nonetheless—that the dilemma should be solved prospectively.

For example, in *U.S. v. Gravatt*, the court addressed a situation where a defendant refused to execute an indigency affidavit on Fifth Amendment grounds.[2] There, the court noted that:

> a defendant's Fifth Amendment-based refusal to complete [an indigency affidavit] puts the trial court in the difficult position of resolving the conflict between the constitutional rights of the defendant and the interest of the government in limiting appointment of counsel to financially qualified individuals.[3]

The court offered two possible ways to address the dilemma. First, the court suggested that the defendant could be provided with the opportunity to offer the evidence *in camera*. If the defendant chooses to do so, the information would be sealed and made unavailable to others. While the defendant's Fifth and Sixth Amendment rights would be shielded by this remedy, the government's interest in limiting appointment of counsel to only the truly indigent is not. If the affidavit is sealed, there is not opportunity for other parties to challenge the accuracy of the information provided.

Second, the court in *Gravatt* cited *Simmons* and suggested that the information could be excluded from use at trial. "If the trial court deems an adversary hearing on defendant's request for appointment of counsel to be appropriate, the court may grant use immunity to the defendant's testimony at that hearing."[4]

Many jurisdictions have utilized the prospective approach to solving the dilemma by adopting a statutory and/or rule-based "prophylactic" mechanism. In so doing, it seems, these states attribute to all defendants the assertion of a colorable Fifth Amendment claim in the indigency affidavit context. Put another way, these states provide for inadmissibility of indigency information, at least in most circumstances.

Washington, for example, provides for the complete confidentiality of indigency information, at least in the "pending case." By prohibiting the prosecution's access to the information contained on indigency affidavits in the first place, it seems, the Fifth Amendment implications are completely avoided. In Washington:

> the court or its designee shall keep a written record of the determination of indigency. Any information given by the accused under this section or sections shall be confidential and

[1] *See United States v. Peister*, 631 F.2d 658 (10th Cir. 1980); *United States v. Sarsoun*, 834 F.2d 1358 (7th Cir. 1987).
[2] 868 F.2d 585 (3rd Cir. 1989).
[3] *Id*. at 590.
[4] *Id*.

> shall not be available for use by the prosecution in the pending case.[1]

In Massachusetts, the information provided in an indigency affidavit is also confidential and shielded from the prosecution. There, the supreme judicial court is authorized to prescribe a form affidavit of indigency.[2] The form prescribed by the court provides:

> By order of the Supreme Judicial Court, all information in this affidavit is CONFIDENTIAL. Except by special order of a court, it shall not be disclosed to anyone other than authorized court personnel, the applicant, applicant's counsel or anyone authorized in writing by the applicant.

Thus, by completely prohibiting all use of indigency information in the underlying case, these jurisdictions focus on the Fifth and Sixth Amendment concerns in the indigency determination context.

Some states, however, also explicitly account for the government's interest in limiting the appointment of counsel to the truly indigent. These states attempt to guarantee the accuracy of the information while simultaneously providing Fifth and Sixth Amendment safeguards by allowing the state to use the information against the defendant in separate contempt or perjury proceedings.

The applicable Nebraska statute addresses these dual concerns. While a defendant in Nebraska is required to submit a "financial statement under oath or affirmation setting forth his or her assets and liabilities, source or sources of income, and such other information as may be required by the court or magistrate,"[3] the statute goes on to account for Fifth and Sixth Amendment concerns:

> The information contained in such a statement shall be confidential and for the exclusive use of the court or magistrate unless it is made to appear to the satisfaction of the court or magistrate that the statement may contain false, misleading, or incomplete information, in which event the person making the statement shall be punished as for contempt if it is established after a hearing that the statement was in whole or in part false, misleading, or incomplete.[4]

Nebraska localities have also elaborated on this statutory restriction. The Third Judicial District, for example, requires each defendant (by rule) to

[1] Wash. Rev. Code § 10.101.020.
[2] Mass. Gen. Laws ch. 261, § 27B.
[3] Neb. Rev. Stat. § 29-3916.
[4] *Id.*

"complete an affidavit under oath concerning his or her financial resources."[1] Further:

> no information provided by a party pursuant to this rule may be used in any criminal or civil proceeding against the party except:
>
> (1) in a prosecution for perjury or contempt committed in providing such information; or
>
> (2) in an attempt to enforce an obligation to reimburse the state for the cost of counsel.[2]

Indeed, the commentary to the Nebraska local rule reflects the dual governmental concerns by specifically noting that the section "is intended to protect the party's right against self-incrimination and to ensure that the information contained in the affidavit is as accurate and complete as possible."[3]

Minnesota similarly emphasizes the importance of ensuring the disclosure of full and accurate information in the indigency determination context by explicitly making appointment of counsel conditional upon execution of a financial statement. There, "a refusal to execute the financial statement or produce financial records constitutes a waiver of the right to the appointment of a public defender."[4] Of course, the statute also alleviates the Fifth and Sixth Amendment problems of such a condition by limiting its use. As in Nebraska, "the information contained in the statement shall be confidential and for the exclusive use of the court and the public defender appointed by the court to represent the applicant except for any prosecution [for perjury]."[5]

Wisconsin even provides a statutory mechanism to challenge the accuracy of the information provided. There, a circuit court may review any indigency determination upon its own motion and "shall review any indigency determination upon the motion of the district attorney or the state public defender."

> The court, district attorney or state public defender may summon the defendant. The defendant may be compelled to testify only as to his or her financial eligibility under this section. If the defendant refuses to testify, the court may find the defendant is not eligible to have counsel assigned for him or her . . . If the defendant testifies at this hearing, his or her testimony as to his or her financial eligibility under this section

[1] Rules of the County Court of the Third Judicial District of Nebraska, Rule 1, § 5.
[2] Rules of the County Court of the Third Judicial District of Nebraska, Rule 1, § 10.
[3] Comments to Rules of the County Court of the Third Judicial District of Nebraska, Rule 1, § 10.
[4] Minn. Stat. § 611.17.
[5] *Id.*

> may not be used directly or indirectly in any criminal action, except in a criminal action regarding a subsequent charge of perjury or false swearing.[1]

Thus far, these various statutory approaches to reconciling the dual concerns of indigency determination have completely prohibited the use of indigency information in the underlying case in which appointment of counsel is sought. Montana, on the other hand, goes further and allows limited use of indigency information, even in the underlying case. As discussed in detail above, although information from an indigency affidavit may not be used as substantive evidence of guilt, use for impeachment purposes does not implicate the Fifth Amendment. Indeed, Montana's indigency determination statute reflects this constitutional reality.

In Montana, defendants are statutorily required to "provide a detailed financial statement and [to] sign an affidavit" in order to be eligible for a public defender.[2] The Montana legislature has also provided by statute that:

> information disclosed in the application, financial statement, or affidavit is not admissible in a civil or criminal action except when offered for impeachment purposes or in a subsequent prosecution of the applicant for perjury or false swearing.[3]

Thus, not only can indigency information be used in separate perjury proceedings, but it can be used to impeach the defendant in the underlying case.

In Oregon, indigency information is also allowed for use in the underlying case but not for impeachment purposes. There, although all information collected by the state courts for purposes of determining financial eligibility for appointed counsel is "confidential and shall not be used for any purpose other than determining financial eligibility," it may be used "by the court in a sentencing proceeding resulting from the defendant's conviction on the matter for which the information was provided or collected."[4] The information may also "used by the court, the Department of Revenue, or the assignees of the court or the Department of Revenue, for the purpose of collecting delinquent amounts owed to [the] state by the person."[5]

While these aforementioned jurisdictions have already addressed the dual concerns inherent in the determination of indigency, Idaho policymakers currently face the challenge of having to protect a person's Fifth and Sixth Amendment rights while also ensuring that a defendant is only appointed counsel if he or she is truly indigent.

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[1] Wis. Stat. § 977.06(4)(a). Note: The statute also restricts the use of evidence derived from information provided in the indigency determination context.
[2] Mont. Code. Ann. § 47-1-111(2)(a).
[3] Mont. Code. Ann. § 47-1-111(2)(c).
[4] Or. Rev. Stat. Ann. § 151.495.
[5] *Id*.

Currently, Idaho Code seems to focus on the latter consideration. In Idaho, a "person shall, subject to the penalties for perjury, certify in writing or by other record such material factors relating to his ability to pay."[1] Yet, while a defendant faces the possibility of perjury charges for providing false information, there is no corresponding restriction of the use of the information in the underlying case or otherwise. A cursory review of the applications for counsel used by the various counties reveals that there is significant variation in how counties use the information. For instance, the indigency applications used by Bannock County and Bear Lake County specifically state that the defendant waives any privilege to the information disclosed. On the other hand, Boise County's form tells the defendant that the information disclosed is subject to the attorney-client privilege.

In light of the various approaches discussed above, the Subcommittee has recommended that the Idaho indigency determination statute be amended to account for constitutional concerns while still also promoting the governmental interest of limiting appointment of counsel to the truly indigent.[2] By requiring the defendant to certify under penalty of perjury all material factors relating to his or her ability to pay for counsel, and by explicitly allowing the information to be used for impeachment purposes and in subsequent perjury proceedings, the proposed amendment would promote the disclosure of true and accurate information by the defendant, thereby limiting appointment of counsel to the truly indigent. Also, the defendant would not face the untenable position of having to choose between his or her Fifth and Sixth Amendment rights. In other words, because the information provided would be inadmissible as substantive evidence of guilt in any civil or criminal proceeding (except one for perjury) a defendant would not be required to sacrifice his or her Fifth Amendment privilege against self-incrimination on the altar of the Sixth Amendment right to counsel.

4. RECOUPMENT

Next, the Subcommittee has discovered that there is inconsistency in terms of whether people are required to contribute to or repay the cost of their court-appointed attorney. Some counties (*e.g.,* Ada, Benewah, and Bingham) require an application fee up-front. Other counties (*e.g.*, Bannock and Blaine) may warn people that they may have to repay the cost of counsel but with little-to-no notice of how much it will ultimately cost them. Others (*e.g.*, Boise) may inform the defendant that he or she will be required to pay a certain amount per month but, again, without any real indication of how much it will cost them.

The Subcommittee became concerned that current contribution and recoupment practices may discourage people from requesting or accepting the

[1] Idaho Code § 19-854(b).
[2] See Appendix, p. 5.

appointment of counsel. In other words, contribution and recoupment practices may "chill" the Sixth Amendment right to counsel.[1]

In *Fuller v. Oregon*, the Supreme Court addressed whether a state could constitutionally require a convicted criminal defendant to repay costs associated with the provision of defense services when he or she is indigent at the time of the criminal proceedings but subsequently acquires the means to bear the costs of legal defense.[2] Oregon had mandated by statute that every defendant in a criminal case be assigned a lawyer at public expense if the defendant was "without means" to obtain counsel.[3] Oregon also required, in some cases, defendants to repay all or part of the "special expenses," including the cost of defense, incurred by the state.[4] By statute, the repayment obligation could be made a condition of probation.[5]

The Oregon statute was challenged on the grounds that it (a) violated the Equal Protection Clause of the Fourteenth Amendment by only requiring *convicted* defendants to repay defense costs; and (b) "chilled" the Sixth Amendment right to counsel by discouraging defendants from accepting court-appointed counsel.

In its examination of the Oregon statute, the Court began by noting that the repayment obligations were never mandatory.[6] "Rather," wrote the Court, "several conditions must be satisfied before a person may be required to repay the costs of his legal defense."[7] First, pursuant to the Oregon statute, repayment is limited to those actually convicted.[8] Second, a court cannot order a convicted person to pay unless he or she can or will eventually be able to pay.[9] In other words, the sentencing court must determine whether the defendant's indigence will likely end. Third, a convicted defendant under a repayment obligation can petition for remission at any time and the courts are empowered to do so if repayment poses a manifest hardship on the defendant or the defendant's family.[10] Lastly, a convicted defendant may not be held in contempt for failure to repay if default was not attributable to an intentional refusal or failure to make a good faith effort.[11] According to the Court, the statute is clearly directed narrowly at those convicted defendants who were "indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation."[12]

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[1] In addition to drafting proposed statutory amendments to address this concern, the Subcommittee provided a letter to the administrative offices of the Idaho Supreme Court requesting that judges only order repayment upon disposition of the case. See Appendix, p. 72.
[2] 417 U.S. 40 (1974).
[3] *Id.* at 43.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 44.
[7] *Id.* at 45.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

> Defendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no 'manifest hardship' will result.[1]

In holding that the Oregon recoupment statute does not violate the Equal Protection Clause, the Court noted that:

> Oregon could surely decide with objective rationality that when a defendant has been forced to submit to a criminal prosecution that does not end in conviction, he will be freed of any potential liability to reimburse the State for the costs of his defense. This legislative decision reflects no more than an effort to achieve elemental fairness and is a far cry from the kind of invidious discrimination that the Equal Protection Clause condemns.[2]

Likewise, the Court further held that the Oregon statute does not violate the Sixth Amendment right to counsel.

> The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel. The Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so. Those who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay.[3]

According to the Court, the statute is constitutional because it targets only those with a foreseeable ability to make a contribution to the costs of his or her defense, and because it only allows enforcement of the repayment obligation against those who can meet the obligation without hardship.[4]

Idaho courts have also recognized that a court can direct a defendant to reimburse the county for the costs of his or her defense to the extent of the defendant's financial ability and, what is more, that the requirement may be imposed as a condition of probation."[5] In *State v. Miyoshi*, the Idaho Supreme Court upheld the revocation of probation of a defendant who failed to reimburse the county for the costs of his court-appointed attorney in the

[1] *Id*. at 46.
[2] *Id*. at 50.
[3] *Id*. at 53.
[4] *Id*. at 54.
[5] *State v. Miyoshi*, 101 Idaho 88 (1980); *See also State v. Walker*, 126 Idaho 508 (Ct.App. 1994).

amount of $52.70.[1] In so doing, the Court noted that the defendant "made no effort to repay the costs of his court-appointed attorney and . . . he offered no evidence to rebut the inference that his default was attributable to an intentional refusal to obey the court's order and to make a good faith effort to pay."[2]

Just as the Court in *Fuller*, the Idaho Supreme Court stopped short of recognizing an unlimited right to reimbursement. On one hand, the Court held that the state does not have the burden of proving ability to pay before revoking probation for failure to satisfy reimbursement obligations.[3] On the other hand, by allowing a defendant to rebut the inference of willful failure to pay or lack of good faith effort to pay, the Court in effect limited the state's ability to collect to those with an ability to pay.

As it currently stands, Idaho Code simply provides that:

> a needy person who receives the services of an attorney provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those services. The immediate inability of the needy person to pay the reimbursement shall not, in and of itself, restrict the court from ordering reimbursement.[4]

The statute is silent as to the proper timing of a reimbursement order. It appears that a court "may" order reimbursement of all or a portion of the costs of public defense services at any time during the proceedings. As discussed above, counties apply this statutory provision in different ways, some of which may discourage defendants from accepting or applying for counsel.

Because of the various approaches to recoupment in Idaho, and because of the potential chilling effects of those approaches, the Subcommittee recommends that § 19-854 be amended to prohibit pre-dispositional contribution and to limit post-dispositional recoupment to the costs associated with conviction, if any.[5] The amendments would lay a solid statutory foundation to effectuate uniform recoupment of the costs associated with public defense services in accordance with constitutional requirements.

5. DATA REPORTING

Last, the Subcommittee has realized that many public defense attorneys do not currently file annual reports pursuant to § 19-864 because the statute only expressly applies to county offices of the public defender.[6] In a letter to

[1] *Id*.
[2] *Id*. at 156.
[3] *Id*.
[4] Idaho Code § 19-854(d).
[5] See Appendix, p. 6.
[6] Pursuant to Idaho Code § 19-864(b), "the public defender in those counties electing to establish and maintain such an office, shall submit an annual report to the board of county commissioners showing the number of persons represented under this act, the crimes involved,

the Subcommittee, John Lynn of the ACLU of Idaho reported that many counties have elected option (2) above by contracting with private attorneys to provide public defender services.[1] These counties claim, according to Lynn, that they have not "established" or "maintained" an "office of public defender" and therefore are not required to submit annual reports to their respective boards of county commissioners pursuant to § 19-864(b). This observation begs the question: from whence does a county's authority to contract with private providers of public defense services come?

Idaho Code § 19-859(a) delegates to the counties the responsibility of providing for the representation of "needy persons" with respect to "serious crimes."

> They shall provide this representation by: (1) establishing and maintaining an office of public defender; (2) arranging with the courts of criminal jurisdiction in the county to assign attorneys on an equitable basis through a systematic, coordinated plan; or (3) adopting a combination of these alternatives.

The ability of a county to contract with private attorneys is not explicitly mentioned in §19-859. Nor is it explicitly mentioned elsewhere in Title 19, Chapter 8, Idaho Code. What is more, an examination of Title 31, Chapter 8, Idaho Code—the statutory provisions enumerating the powers and duties of boards of county commissioners—does not reveal a direct reference to an authority to contract with private attorneys for public defender services. If the authority to contract does not explicitly reside elsewhere in Idaho Code, it must be implied from §19-859.

There are no court cases in Idaho on point. In fact, there are no cases at all on the subject. The only Idaho case that even *references* the code section, *State v. Fisk*,[2] addresses timeliness of appointment of counsel. Further, an examination of the legislative history of §19-859 and its predecessors offers little guidance. In 1897, §19-859's original predecessor was enacted as follows:

> Sec. 6. Whenever upon the trial of a person in the district court, upon an information or indictment, it appears to the satisfaction of the court, that the accused is poor and unable to procure the services of counsel, the court may appoint counsel to conduct the defense of the accused, for which service such counsel must be paid out of the county treasury, upon order of the judge of the court, as follows: In all cases of misdemeanor the sum of ten

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the outcome of each case, and the expenditures (totalled [sic] by kind) made in carrying out the responsibilities imposed by this act."

[1] Ltr. from John C. Lynn, Atty., Am. Civ. Liberties Union of Idaho, to Zaine Baird, Mgt. Asst., Idaho Dept. of Corrections, *Idaho Criminal Justice Commission Public Defense Subcommittee*, 2 (November 14, 2011) (copy on file with recipient).

[2] 92 Idaho 675 (1968).

> dollars; in all cases of felony other than murder the sum of twenty-five dollars and in cases of murder the sum of fifty dollars.[1]

By 1908, the law had been re-designated as Idaho Revised Code § 2086. Again, in 1919, the law was re-designated as Idaho Compiled Statutes § 8859. Finally, by 1932, the law had been re-designated as I.C. § 19-1413. In 1937, I.C. § 19-1413 was amended as follows:

> 19-1413. Appointment of counsel for accused.—Whenever upon the trial of a person in the district court, upon an information or indictment, it appears to the satisfaction of the court, that the accused is poor and unable to procure the services of counsel, the court may appoint counsel to conduct the defense of the accused, for which service such counsel must be paid out of the county treasury, upon order of the judge of the court, ~~as follows: In all cases of misdemeanor the sum of ten dollars; in all cases of felony other than murder the sum of twenty-five dollars and in cases of murder the sum of fifty dollars~~ such sum as the court may deem reasonable for the services rendered.[2]

One last time, in 1948, I.C. § 19-1413 was re-designated as I.C. § 19-1513. In 1967, I.C. § 19-1513 was repealed and replaced with the current version of I.C. § 19-859.[3] Unfortunately, the legislative committee meeting minutes reveal very little about the reasoning behind the enactment of the current law:

> House Bill 229 was brought before the Committee for recommendation. Mr. Jenson moved that the Committee report House Bill 229 to the House with a do pass recommendation. Mr. Andersen seconded the motion and it was carried. Mr. Robert Green will carry the bill and Mr. Crapo will assist him, if Mr. Green desires.[4]

Though the legislative history of §19-859 certainly confirms that the responsibility of providing indigent defense has resided with the counties since this state's infancy, it does little to establish that the enactment of the current version of § 19-859 did or did not contemplate the provision of indigent defense by contract.

By extension, the legislative history of §19-859 does little to elucidate whether private contractors were intended to fall under § 19-864(b)'s reporting

[1] 1897 Idaho Session Laws, p. 74, § 6.
[2] 1937 Idaho Session Laws, ch. 85 §1.
[3] 1967 Idaho Session Laws, ch. 181 § 9.
[4] H.R. Jud., R., & Admin. Comm., H. B. No. 229, *An Act Relating to the Defense of Needy Persons*, February 22, 1967.

requirements as "public defenders in those counties electing to establish and maintain" an office of the public defender. It seems, therefore, that any analysis of the counties' authority to contract with private providers or their reporting obligations must be limited to mere statutory construction of § 19-859.

Pursuant to §19-859(a), the first way a county may fulfill its duty to provide for representation of "needy persons" is by "establishing and maintaining an office of public defender." Shall it be presumed that the adverb, "directly," is implied to modify the phrase, "establish and maintain"? In other words, does subsection (a)(1) only encompass the *direct* establishment and maintenance of an office of public defender by the county? Although those aware of the subtle differences in the means of public defense provision are careful to distinguish between "public defenders" and "contractors," the phrase, "office of public defender," *could* be read to include offices established and maintained indirectly by private individuals pursuant to a government contract. If this were the case, then it would follow that public defense contractors would have to submit an annual report to their respective boards of county commissioners pursuant to §19-864(b).

Because the code section goes further to enumerate other means by which counties can satisfy their duty, however, it seems § 19-859's meaning should be derived from a plain reading of the text. In other words, subsection (a)(1) most accurately encompasses only those counties that directly establish and maintain an office of the public defender.

The second statutory means by which a county may fulfill its duty to provide for representation of "needy persons" is by "arranging with the courts of criminal jurisdiction in the county to assign attorneys on an equitable basis through a systematic, coordinated plan." The question, therefore, becomes: does the assignment of attorneys on an "equitable basis" through a "systematic, coordinated plan" capture contracting with private providers of indigent defense? If so, as claimed by many counties according to Lynn, private contractors are not "establishing and maintaining" an office of the public defender pursuant §19-859(a)(1) and, therefore, are not required to file annual reports pursuant to §19-864(b).

These conclusions suggest that private contractors are not currently under a statutory obligation to file annual reports to the counties by virtue of §19-864(b). Yet, subsection (a) requires all "defending attorneys," as opposed to just "public defenders," to keep appropriate records respecting the people they represent. This begs another question: why would all "defending attorneys" be required to "keep appropriate records respecting each needy person" they represent if they are not required to report those records? Then again, why would the authors draft the statute in such a way as to reference "defending attorneys" in one section and then "public defenders" in the next? Regardless, as it stands, though all "defending attorneys" are required to "keep appropriate records" respecting "each needy person" they represent, only public defenders in "those counties electing to establish and maintain such an office" are statutorily required to report any information.

Indeed, the reality that at least some public defenders do not currently gather and/or report data regarding their provision of public defense services is evidenced by the Subcommittee's attempt to gather the data itself. In the fall of 2010, the Subcommittee sent a survey to the various public defender ("PD") offices and public defense contractors. The survey requested data from October 1, 2009 through September 30, 2010. Generally, the survey requested data regarding the office staff sizes, caseloads, and budgets. Specifically, with regard to staff, the survey inquired as to how many (by full-time and part-time positions) attorneys, paralegals, administrative staff, investigators, victim witness coordinators, and other positions were employed by each office. As to caseloads, the survey inquired as to how many (by new case and probation violation) felony, misdemeanor, juvenile, mental health, child protection, infraction, and other cases were handled. As to budgets, the survey requested figures by line-item: personnel, conflict, criminal, civil, total operation, capital, and facilities.

Ultimately, responses from the various offices were inconsistent. Some offices provided complete responses, others provided partial responses, and some offices provided no response at all. Furthermore, many of the offices were slow to provide responses. In order to attempt to satisfy the central limit theorem, and thereby conduct meaningful univariate statistical analysis, the data set was reduced to eight independent interval-level variables: (1) number of full-time-equivalent attorneys employed; (2) total annual budget; (3) total number of new felony cases; (4) total number of new misdemeanor cases; (5) total number of new juvenile cases; (6) total number of new mental health cases; (7) total number of new child protection cases; and (8) total number of new cases. These eight variables garnered the most responses from the various offices. Statistics of central tendency, *i.e.*, mean and median were calculated along with a statistic of dispersion, *i.e.*, standard deviation.[1]

As illustrated in Figure 5 these data are characterized by an irregular distribution.[2] As a distribution of data gets more and more irregular, univariate analysis becomes less and less meaningful, as the standard deviation from the mean increases. For example, the average annual budget of the various PD offices is $562,961.[3] However, the standard deviation is $1,199,547. This means 68% of the office budgets vary within +/- $1,199,547 of the mean, $562, 961.

The irregularity of the distribution is attributable to three factors. First, the distribution is irregular due to the small sample size (*n*). The small sample

[1] "Standard deviation" is a statistic that expresses how tightly various observations are clustered around the mean of data set. When the observations are tightly bunched together and the bell-shaped curve is steep, the standard deviation is small. When the examples are spread apart and the bell curve is relatively flat, there is a relatively large standard deviation. One standard deviation away from the mean in either direction on the *x* axis accounts for approximately 68 percent of the observations. Two standard deviations away from the mean accounts for roughly 95 percent of the population. Three standard deviations accounts for about 99 percent of the population. See Figure 3, Appendix, p. 50.

[2] See Appendix, p. 52.

[3] See Figure 5, Appendix, p. 52.

size is a function of the relatively small number of counties (44) coupled with missing responses. At best, any given variable will have an *n* of 30, the bare minimum required to satisfy the central limit theorem. However, most variables only have an *n* of between 25 and 30. Second, there are three outlier offices which skew the overall distribution. Ada, Canyon, and Kootenai counties are atypical of the overall sample in that most their responses are outside of, at least, two standard deviations from the mean. The third factor, which is related to the second, is the wide range of these data. For example, Ada County handled 10,029 misdemeanor cases in 2010, whereas Clark County handled only 2.

In spite of the irregularity of the distribution, variables were combined in an attempt to control for factors which create the irregularity, *e.g.*, felony cases per attorney per year. By essentially controlling for the population of the counties, the distribution somewhat normalizes.[1] However, due to—again—the small sample size, the distribution is still relatively irregular. Nonetheless, the data are more meaningful.

Furthermore, four new independent variables were created to make certain comparisons between the offices. First, a variable was created to compare offices in terms of funding by controlling for "demand" on the offices. In other words, the variable represents financial strain on an office. This variable was created by dividing the number of dollars in the PD defense budget by the number of arrests in the same year.[2] Though perhaps not a perfect indicator, "arrests per year" serves as a proxy for "demand" on the various offices. These statistics were then ranked.[3] Second, a variable was created to compare offices in terms of individual attorney workload by controlling for the size of the various offices. This variable was created by dividing the number of total cases by the number of FTE attorney positions. Third, a variable was created to compare the offices in terms of total demand by controlling for population. Again, though imperfect, "demand" was measured by calculating arrests per capita in the counties. Fourth, median household income was used as a way of comparing the counties in terms of wealth, which could affect the potential number of indigent criminal defendants.

Essentially, Figure 4 attempts to illustrate the relative "strain" on the various offices by comparing them in terms of multiple factors that could potentially put "stress" on an office. For example, the size of the budget limits the number of attorneys, investigators, and other staff members a particular office can hire. The number of cases a given office handles affects the workload of those attorneys and staff members. The number of arrests affects the number of ultimate cases which, similarly, affects workload. Last, the wealth of a county could affect the number of indigent people which, in turn, could affect workload.

[1] See Figure 6, Appendix, p. 53.
[2] Data on arrests were gathered from the Idaho State Police Crime in Idaho Report, 2010.
[3] See Figure 4, Appendix, p. 51.

However, some of these data are suspect. For example, the variable measuring total number of cases per full-time attorney is limited because the counties may vary in terms of how each defines a "case." Also, the variable measuring relative wealth of the counties may be less helpful (for purposes of measuring "strain") because, although the data on MHI are accurate and uniform, each county defines "indigency" differently. As such, MHI tells us less about how many potential cases a PD office will have to handle.

With a uniform definition of "case," and complete responses from all 44 counties, the potential for more meaningful statistical analysis would increase greatly. Furthermore, bivariate analysis, such as multiple-regression analysis, could be conducted to measure causal relationships between independent variables. For example, multiple-regression analysis could calculate whether there is a statistically significant relationship between, say, "number of cases per attorney per year" and "number of appeals per year." In other words, such an analysis could empirically measure whether workload affects the number of appeals filed. However, without reliable data from *at least* 35-40 counties, such bivariate analysis is unreliable.

The proposed amendments to Title 19 add "defending attorney" as a defined term to include the myriad public defense practitioners in Idaho who are private attorneys appointed by the court on a case-by-case basis or contracted by the county on a systematic basis.[1] By expanding the reporting requirements to all attorneys providing public defense services, the amendments will facilitate the collection of comprehensive data—a foundational prerequisite to meaningful assessment of Idaho's public defense system.

Any meaningful assessment of Idaho's public defense system would certainly require a measurement of the various caseloads and workloads. "If it were possible to evaluate the overall health of a jurisdiction's indigent defense system by a single criterion," writes the NLADA, "the establishment of reasonable workload controls might be the most important benchmark of an effective system."[2]

Among other things, measuring workload and/or caseload promotes quality representation and compliance with national standards by giving public defense attorneys an empirical basis to either request additional funding or request the court to cease appointments. "Public defender workload is impacted by a convergence of decisions made by other governmental agencies and beyond the control of the indigent defense system itself."[3] This puts public defense attorneys in a precarious situation because they are obliged to accept cases appointed to them by the court in numbers beyond their control

[1] See Appendix, p. 2.

[2] Natl. Leg. Aid & Defender Assn., *The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Courts, Evaluation of Trial-Level Indigent Defense Systems in Idaho*, iv (Natl. Leg. Aid & Defender Assn. 2010).

[3] Ltr. from David J. Carroll, Dir. of Research, Natl. Leg. Aid & Defender Assn., to Idaho Crim. Just. Commn. Pub. Def. Subcomm. (Aug. 29, 2010) (Idaho Crim. Just. Commn., Pub. Def. Subcomm., Sept. 8, 2010 Meeting Minutes, 8).

and, at the same time, are ethically obligated to provide quality representation. Prosecutors, on the other hand, have an ability to control their workflow by refusing to bring charges if they deem fit. "Without a process for a public defender office to control its own caseloads and to secure additional resources or to stop the flow of new cases when workloads reach their maximum, the public defense office is constantly running on a case processing treadmill."[1]

When considering workload and caseload measurement, it is important to note the difference between the two.

> Many practitioners still tend to think of their caseload only in terms of the number of clients they are assigned to represent. Yet, this captures only a portion of their full workload . . . . There are fewer and fewer 'easy' cases, and with the growth of public defender programs many attorneys find themselves spending more and more time on administrative matters. Thus, the amount of time an attorney must spend to competently represent a client is not accurately reflected by the number of clients alone.[2]

While caseload figures represent the raw number of cases handled by a particular attorney or office, workload figures represent the amount of work and/or time required to adequately dispose of those cases. Because different types of cases (*e.g.*, felony or misdemeanor) take different amounts of time to handle, and because the factual particulars of each individual case can alter the relative amount of time required to adequately handle a case, caseload figures are—at best—inaccurate and—at worst—arbitrary in representing actual workload. However, while workload figures are most useful, caseload figures are oftentimes the only figures available and, further, are instrumental in determining actual workload.

The most obvious way to empirically measure actual workload, and perhaps the most accurate way (if done correctly and consistently), is to simply track comprehensive, consistent, and contemporaneous time records. Unfortunately, though simple, this is also likely the most burdensome way to measure workload. Nonetheless, some jurisdictions have workload control measures in place that require their public defense attorneys to keep such contemporaneous records. For example, Montana requires its public defenders to track time spent on all cases in increments of one tenth of an hour and to submit timesheets on a weekly basis.[3] Further, "attorneys shall associate time

[1] U.S. Dept. of Just., Bureau of Just. Assistance, *Public Defense Reform Since Gideon: Improving the Administration of Justice by Building on Our Successes and Learning from Our Failures, A Public Defense Leadership Focus Group*, 19 (U.S. Dept. of Just., Bureau of Just. Assistance 2008).

[2] The Spangenberg Group, *Keeping Defender Workloads Manageable, Indigent Defense Series*, 3 (Bureau of Just. Assistance 2001).

[3] Admin. R. Mont. 47-1-202-215 (2009).

worked to individual cases" and the time "shall be allocated to the most applicable general time tracking type."[1]

Fortunately there are other ways to obtain workload figures. Most notably, case weighting transforms raw caseload figures (the number of cases handled) into workload figures (the amount of effort required to complete the caseload measured in units of time) once case weights are determined by individual case type. For example, a domestic violence misdemeanor offense may take an average total of 4.2 hours to settle at or before pretrial conference whereas a DUI misdemeanor offense may only take 2.2 hours. Thus, the DV offense would have a weight of 4.2 and the DUI offense would have a weight of 2.2. The number of cases are then simply multiplied by their respective weights and then aggregated to calculate a figure that represents the overall time required to dispose of the entire caseload, *i.e.*, workload.

Case weights can be determined either by the Delphi Method or the Time-Record Method.[2] Under the Delphi Method, a sample of attorneys is given a series of scenarios designed to reflect typical cases and scenarios found in public defender workloads. The attorneys are asked to estimate the amount of time involved handling the various scenarios and these various estimates are averaged to calculate the case weight figure. The Delphi Method results in "case weights based on 'strong educated guesses' about the relative time required to complete various tasks."[3]

With the Time-Record Method, instead of using *estimates* from attorneys, "detailed time records are kept by public defender attorneys, over a given period of time, typically ranging from seven to 13 weeks."[4] These *actual* time figures, as opposed to the estimates, are then averaged to calculate the case weight figures. According to the Spangenberg Group, the time-record method "is the most thorough and complete method to determine valid, empirical workload measures that can be translated into caseload standards for public defender programs." [5]

It does not appear that any Idaho counties currently have caseload and/or workload measurement mechanisms in place. As mentioned above, measuring workload and/or caseload (among other things) gives public defense attorneys an empirical basis to request additional funding. "Without data, decision-makers are left to form policy on anecdotal information, and the formation of public attitudes is consigned to speculation, intuition, presumption, and even bias."[6] With such an empirical tool at their disposal, county public defender offices and public defense contractors could objectively analyze whether their offices are appropriately staffed or otherwise equipped to competently handle their caseloads. A case-weighting study could be

[1] *Id*.
[2] The Spangenberg Group, *Tennessee Public Defender Case-Weighting Study*, 9 (The Natl. Ctr. for St. Courts 1999).
[3] *Id*.
[4] *Id*.
[5] *Id*. at 10.
[6] Ltr. from David J. Carroll, Dir. of Research, Natl. Leg. Aid & Defender Assn., to Idaho Crim. Just. Commn. Pub. Def. Subcomm. (Aug. 29, 2010).

conducted using either the Delphi Method or the Time-record Method, as discussed above. The Delphi Method, though not as accurate as the Time-Record Method, could be completed with minimal resources and would go a long way in objectively measuring workload.

Regardless of the type of case-weighting study utilized, however, a uniform definition of "case" is a necessary starting point. "In developing workload or caseload standards for a given jurisdiction, it is critical to use a common definition of what constitutes a case."[1] For example, does a single "case" include any subsequent probation violation and/or any additional offenses charged in the initial citation?

Currently, as discussed above, Idaho public defender offices do not utilize a uniform definition of "case." Thus, any case-weighting study would be a futile effort. As such, Idaho public defender offices and contractors—at least—should use a uniform definition of "case" so as to establish baseline data and facilitate a case-weighting study and possible subsequent workload measurement. "Whereas it is important for the indigent defense system (including public defenders, court-appointed attorneys, and contract defenders) in a given jurisdiction to count cases using a uniform definition, it is optimal when the courts and prosecution in the jurisdiction also use the same definition."[2] In other words, though it would be ideal for the courts, prosecutors, and public defenders to all use the same definition of a "case," public defender offices and contractors should—at least—do so to facilitate meaningful analysis and comparison across county lines.[3]

[1] The Spangenberg Group, *Keeping Defender Workloads Manageable, Indigent Defense Series*, 4 (Bureau of Just. Assistance 2001).
[2] *Id*.
[3] See Appendix, pp. 68-69, for sample definitions of "case."

B.
REVISION OF THE JUVENILE CORRECTIONS ACT

The Subcommittee's second recommendation is to amend sections of the Juvenile Corrections Act. First, the proposed legislation amends § 20-514 to expound the circumstances in which juveniles are appointed counsel and to conform their right to counsel as close as possible to that of adults.

In *In re Gault*, the U.S. Supreme Court held that children have a due process right to an attorney in juvenile delinquency court proceedings.[1] "Whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[2] According to the Court, the Due Process Clause of the Fourteenth Amendment requires that, with respect to proceedings to determine delinquency "which may result in commitment to an institution in which the juvenile's freedom is curtailed," the child be apprised of his or her constitutional right to counsel.[3]

Though it is clear that children enjoy a constitutional right to counsel in such delinquency proceedings, it is less clear exactly when that right attaches. As the Court made clear in *In re Gault*:

> we do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile 'delinquents.' For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process.[4]

For adults, however, the right to counsel attaches at all "critical stages" of the proceedings, "commencing when adversary judicial proceedings are initiated, whether by formal charge, preliminary hearing, indictment, information, or arraignment."[5] Idaho courts have not addressed the issue in the juvenile context, however, and Idaho Code only directs counsel to be appointed "as early as possible in the proceedings."[6]

Though Idaho courts, again, have not addressed the issue, other courts have consistently held that juveniles, like adults, have a constitutional right to counsel at all "critical stages."[7] To account for this right, the Subcommittee

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[1] 387 U.S. 1, 41 (1967).
[2] *Id*. at 13.
[3] *Id*. at 41.
[4] *Id*. at 14.
[5] *State v. Contreras-Gonzales*, 190 P.3d 197, 201 (Idaho App. 2008) (citing *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *State v. Bagshaw*, 108 P.3d 404, 407 (Idaho App. 2004); *State v. Shelton*, 934 P.2d 943, 946–47 (Idaho App. 1997)).
[6] Idaho Code § 20-514(1).
[7] *See e.g. A.D. v. State,* 740 S.2d 565 (Fla. App. 5th Dist. 1999); *In re Solis*, 706 N.E. 2d 839 (Ohio App. 8th Dist. 1997); *M.R.R. v. State*, 903 S.W.2d 49 (Tex. App. 1995).

has recommended that § 20-514 be amended to specifically articulate when a juvenile is entitled to counsel. The language mirrors § 19-852 and provides in part, as it does for adults, for the right to "be counseled and defended at all stages of the matter beginning with the earliest time and including revocation of probation."[1]

The timing of the attachment of the right to counsel becomes particularly important with diversion or other means of informal adjustment. Many states have specifically held that participation in a diversion program is not a "critical stage" and does not trigger the right to counsel, particularly when all statements made during the preliminary conference are inadmissible at the fact-finding stage.[2]

Some courts have also found that pretrial juvenile detention hearings do not rise to the level of "critical stage."[3] On the other hand, others have held that a pre-adjudication hearing is a critical stage and triggers the right to counsel.[4] Thus, there appears to be some variation in how courts interpret what constitutes a "critical stage" in the juvenile context. The point at which the Sixth Amendment right to counsel attaches, *i.e.*, whether it is a critical stage, is often a question of state law, depending on at what point under state law formal charges are initiated.[5]

Instead of providing for the right to counsel in the diversion context, the Subcommittee has decided to instead limit the admissibility of statements made by juveniles in pre-adjudication proceedings.[6] While—as mentioned above—there is constitutional ambiguity and significant variance nationwide as to whether a juvenile is entitled to the assistance of counsel in the pre-adjudication context, the amendments will balance the rights of juveniles with the government's interest in facilitating informal disposition of juvenile proceedings.

These proposed amendments reflect the belief that counsel is particularly important for juveniles, given that they generally may not understand or appreciate the legal process.

> Delinquency cases are complex matters that raise legal, child and family-centered issues and engage overlapping court, school, supervision, service and treatment systems. Delinquency cases have direct and collateral consequences that significantly impact the lives of children and their families. Recent advances in brain research also confirm that children and adolescents are different from adults. They do not have the same cognitive, emotional, decision-making or behavioral capacities as adults.

[1] See Appendix, pp. 17-18.
[2] *See e.g. In re H.*, 337 S.2d 118 (N.Y. 1972); *Lowe v. State*, 501 S.2d 79 (Fla. App. 5th Dist. 1987).
[3] *In re C.J.*, 764 N.E.2d 1153 (Ill. App. 1st Dist. 2002).
[4] *State ex rel. M.C.H. v. Kinder*, 317 S.E.2d 150 (W. Va. 1984).
[5] *Com. v. Malvo*, 2003 WL 21033418 (Va. Cir. Ct. 2003).
[6] See Appendix, p. 16.

> Special care must be taken to ensure that the child's developmental immaturity is considered among the other relevant issues of the case."[1]

For this reason, the Subcommittee has also considered the circumstances in which a juvenile should be allowed to waive the right to counsel in the proceedings. Once the right to counsel in juvenile proceedings does attach, under what circumstances may it be waived? According to the current version of the statute, a juvenile's waiver must be made "intelligently."[2] Furthermore, a waiver must be accompanied by a magistrate's determination that the best interest of the child does not require the appointment of counsel.[3] Though it has been noted that "a waiver of counsel is invalid unless it is made knowingly, intelligently and voluntarily," Idaho courts have done little to elucidate what exactly constitutes an "intelligent waiver" in the juvenile context.[4]

There are no Supreme Court cases on point and state courts apply different standards. Some states, for example, examine the issue in terms of so-called "*Faretta* warnings." Some courts have held that *Faretta* warnings, *i.e.*, admonishments regarding the "dangers and disadvantages" of self-representation, are not required in the juvenile context. Instead, these cases hold that whether a juvenile has knowingly, voluntarily, and intelligently waived the right to counsel should be determined after considering the totality of the circumstances.[5]

> Many juvenile proceedings, such as the one before us, involve simple matters in which there is no dispute. In such cases, there is little in the way of intricacies of the offense, technical rules of evidence, or rules relating to the examination of witnesses, which would need to be described as dangers and disadvantages of self-representation.[6]

The factors considered by these courts in the totality of the circumstances analysis include the age, intelligence, and education of the juvenile, the juvenile's background and experience (including with the courts), the presence of the juvenile's parents, the language used by the court in describing the juvenile's rights, the juvenile's conduct, the juvenile's emotional stability, and the intricacy of the offense.[7]

Other courts, however, have found that a juvenile's waiver is not knowingly and intelligently made unless he or she is advised of the dangers

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[1] *Performance Guidelines for Quality and Effective Juvenile Delinquency*, Juvenile Defenders Association of Pennsylvania, p. 1.
[2] Idaho Code § 20-514(1).
[3] *In Interest of Kinley*, 702 P.2d 900 (Idaho App. 1985).
[4] *Id*. at 903.
[5] *In re Dalton S.*, 730 N.W.2d 816 (Neb. 2007).
[6] *Id*. at 824-825.
[7] *Id*. at 825.

and disadvantages of self-representation.[1] To these courts, constitutional protections regarding waiver of counsel "apply with equal, if not greater, force in the context of a delinquency proceeding."[2]

> These judicial pronouncements embody the common sense notion that the validity of a child's waiver of counsel depends upon furnishing the child full information not only about the child's own legal rights but also about the overall nature of the proceeding against him or her. The need for broad-gauged advice is underscored by recent empirical studies demonstrating that significant numbers of children erroneously believe that lawyers are responsible for deciding issues of guilt and punishment, that defense lawyers will not advocate the interests of a juvenile who admits to the violation and that defense lawyers have a duty to report to the court any evidence of the juvenile client's culpability.[3]

Thus, there is considerable variation in terms of how vigorous courts are in ensuring a juvenile's waiver is intelligently made. In Idaho, it could be argued that the statutory "best interest" requirement demands a more vigorous inquiry. In other words, because Idaho Code requires the court to determine not only that a juvenile's waiver is intelligently made, but also that waiver is in the juvenile's best interest, it seems that the law contemplates heightened protection for juveniles in the waiver context. To clarify these protections, the proposed amendments set forth particular requirements that must be met before a juvenile may waive the right to the assistance of counsel in the proceedings.[4]

The Subcommittee has also considered whether certain types of proceedings should preclude waiver of the right to counsel altogether. Again, Idaho Code's current "best interest" standard in the waiver context is relevant in examining whether juveniles can be prevented from waiving counsel, *i.e.*, whether juveniles have a constitutional right to self-representation.

Again, Idaho Code requires the court to consider whether waiver is in the best interest of juveniles and authorizes the court to prevent waiver if it determines that their best interests are not served. However, is it *constitutional* to do so? It is well established that adults have a constitutional right to self-representation that is derived from the Sixth Amendment's right to counsel.

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense . . . . Although not

[1] *See e.g. In re Christopher H.*, 596 S.E.2d 500 (S.C. App. 2004); *Matter of Maricopa County Juvenile Action No. JV-116553*, 782 P.2d 327 (Ariz. App. 1989); *In re Manuel R.*, 543 A.2d 719 (Conn. 1988); *J.W. v. State*, 763 N.E.2d 464 (Ind. App. 2002).
[2] *In re Manuel R.*, 543 A.2d at 737.
[3] *Id*. at 738.
[4] See Appendix, pp. 18-19.

> stated in the [Sixth] Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment.[1]

Though juveniles also have a constitutional right to counsel, their right is derived from the Fourteenth Amendment's Due Process Clause, not the Sixth Amendment.[2] Indeed, juveniles have other due process rights that mirror the Sixth Amendment rights of adults. For instance, juveniles have the right to have their guilt proven beyond a reasonable doubt.[3]

However, juveniles do not enjoy all of the rights provided to adults by the Sixth Amendment. In *McKeiver v. Pennsylvania*, the Supreme Court held that juveniles do not have a constitutional right to trial by jury as the due process right of fundamental fairness, with a focus on fact-finding procedures, is not implicated.[4]

> The applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness. As that standard was applied in those two cases, we have an emphasis on factfinding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis. But one cannot say that in our legal system the jury is a necessary component of accurate fact finding.[5]

It could be argued that, not unlike jury trials, the right to self-representation is not a necessary component of accurate fact finding. As such, fundamental fairness, *i.e.*, due process, is not implicated when juveniles are prevented from representing themselves.

Indeed, many states currently restrict a juvenile's right to waive counsel and proceed *pro se*. Juveniles in Pennsylvania are presumed to be "indigent" and are appointed counsel unless they retain private counsel.[6] What is more, juveniles may not waive their right to counsel if they are under fourteen years of age or in certain hearings, *e.g.*, detention hearings, transfer hearings, and adjudicatory hearings.[7] Similarly, Ohio limits waiver by juveniles. There, a juvenile may not waive the right to counsel if he or she has not been counseled by a parent, guardian, or custodian and has not otherwise consulted with an attorney.[8] North Carolina, however, flatly prohibits waiver by juveniles and statutorily requires them to be represented by appointed counsel unless they

[1] *Faretta v. California*, 422 U.S. 806, 819 (1975).
[2] *In re Gault*, 387 U.S. at 41.
[3] *In re Winship*, 397 U.S. 358 (1970).
[4] 403 U.S. 528, 543 (1971).
[5] *Id.*
[6] Pa. R. Juv. Ct. Proc. 152.
[7] *Id.*
[8] *In re C.S.*, 874 N.E.2d 1177, 1191 (Ohio 2007).

retain private counsel.[1] Juveniles in North Carolina are also "conclusively presumed to be indigent" and are not required to submit an affidavit of indigency.[2]

Again, in recognition of the heightened importance of counsel for juveniles, the Subcommittee's proposed legislation enumerates the situations in which waiver of the right to counsel in the proceedings is prohibited altogether.[3]

[1] N.C. Gen. Stat § 7B-2000.
[2] *Id*.
[3] See Appendix, p. 19. Note: Prior to the print hearing for RS 21690, members of the Subcommittee and legislative representatives agreed that indigency determination, recoupment, and contribution practices in the juvenile context should mirror that of adults. To achieve this end, RS 21690 was amended to reference Chapter 8, Title 19, Idaho Code as well as adopt analogous language. This language was incorporated in the printed Idaho H. 149, 62d Leg., 1st Sess. 3. See Appendix, pp. 46-47.

C.
REVISION OF THE CHILD PROTECTIVE ACT

Until 1967, children did not have a constitutional right to counsel in juvenile delinquency court proceedings. Although *Gault* held that children have a due process right to an attorney in such proceedings, children in dependency proceedings, *i.e.*, child protection proceedings, were still without a legal right to counsel. Yet, the realm of personal family life has been held to be a fundamental interest protected by the Fourteenth Amendment. In *Santosky v. Kramer*, the Court stated that "there is a historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."[1]

Because of the fundamental liberty interest inherent in familial relationships, the U.S. Supreme Court has held that due process demands the right to counsel for parents in parental termination proceedings, depending on the circumstances of the case.[2] Though the Court declined to find an absolute right to counsel, it held that trial courts should, in the first instance, balance three factors posited in *Mathews v. Eldridge*[3] when evaluating the demands of due process, namely, the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions.[4] Depending on the relative weight of these factors, parents *may* have a right to counsel in termination proceedings.

Though the U.S. Supreme Court, again, stopped short of establishing an absolute constitutional right to counsel in parental termination proceedings, the Court clearly articulated its position that the Fourteenth Amendment's demands on the states are merely a floor and that "wise public policy" may demand more.

> In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well.[5]

Nonetheless, the Court's opinion only addressed the due process rights of *parents*. Whether *children* have the same due process rights as their parents in the dependency context has yet to be addressed by the U.S. Supreme Court.

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[1] 455 U.S. 745, 753 (1982).
[2] *Lassiter v. Department of Social Services*, 452 U.S. 18, 32 (1981).
[3] 424 U.S. 319, 335 (1976).
[4] *Lassiter*, 452 U.S. at 31-32.
[5] *Lassiter*, 452 U.S. at 33-34.

"Traditionally, children were viewed more or less as chattels and it was assumed that the legal interests of an abused and neglected child would be represented either by the parent or by the state."[1] However, particularly after passage of the Child Abuse Prevention and Treatment Act[2] (CAPTA), courts have recognized that children are persons with rights protected by the Constitution. As the court announced in *Planned Parenthood of Central Missouri v. Danforth*, "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[3]

If children enjoy constitutional rights to the same extent as adults, then it follows that, via *Lassiter*, due process provides for a child's right to counsel in parental termination proceedings, depending on the circumstances of the case, just as with parents. Indeed, "the Ninth Circuit recognizes that . . . a 'child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest.'"[4] Several other federal district and circuit courts have held as much.[5] Thus, to the extent parents have a liberty interest in their familial relationships, and with it a corresponding right to counsel in termination proceedings, children do as well.

Other courts have gone one step further and held that, not only do children have a fundamental liberty interest at stake in parental *termination* proceedings, but that this liberty interest is at stake in general *deprivation* proceedings as well.[6]

> Children have fundamental liberty interests at stake in deprivation and [termination] proceedings . . . . Furthermore, a child's liberty interests *continue to be at stake even after the child is placed in state custody*. At that point, a 'special relationship' is created that gives rise to rights to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm. Thus, a child's fundamental liberty interests are at stake not only in the initial deprivation hearing but also in the series of

[1] Children's Advocacy Institute, First Star & University of San Diego School of Law, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children* 6 (2d ed., CAI 2009).
[2] 42 U.S.C. § 5101 et seq.; 42 U.S.C. § 5116 et seq.
[3] 428 U.S. 52, 74 (1976). *See also In re Gault*, 387 U.S. at 13 ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone").
[4] *Curnow v. Ridgecrest Police*, 952 F.2d 321 (1991) (quoting *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir. 1987), *overruled on other grounds*, *Hodgers-Durgin v. by de la Vina*, 199 F.3d 1037 (9th Cir. 1999)). *See also Burke v. County of Alameda*, 586 F.3d 725, 731 (2009) (parents' and children's constitutional right to live together without government interference is an essential liberty interest protected by the Fourteenth Amendment).
[5] *See Lowery v. County of Riley*, 522 F.3d 1086, 1092 (2008) (a child has a constitutionally protected liberty interest in a relationship with his or her parent); *Suboh v. District Attorney's Office of Suffolk Dist*., 298 F.3d 81 (2002) (a child has a liberty interest in being in the care and custody of his or her parents).
[6] *In re Kenny A.*, 356 F.Supp.2d 1353 (2005).

> hearings and review proceedings that occur as part of a deprivation case once a child comes into state custody.[1]

What is more, *Kenny A.* specifically rejects the notion that a child's *physical* liberty is not at stake in deprivation proceedings.

> To the contrary, the evidence shows that foster children in state custody are subject to placement in a wide array of different types of foster care placements, including institutional facilities where their physical liberty is greatly restricted.[2]

Taken together, the relevant controlling case law requires that children, at least, be provided with a right to counsel in *termination* proceedings to the same extent as their parents. The demands of due process are determined by weighing the *Eldridge* factors, namely, the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. However, other persuasive authority, such as the dicta in *Lassiter* and the *Kenny A.* decision out of the Northern District of Georgia, suggests that children are entitled to more protection than their parents. Because of the potential physical liberty interests at stake in general deprivation proceedings, children should be apprised of their right to counsel at all stages of such proceedings, not simply when termination of parental rights is a possibility.

Currently in Idaho, children are only unqualifiedly entitled to a guardian ad litem ("GAL") in child protection proceedings. However, the GAL's role is to protect the "best interests" of the child—not necessarily to advocate on behalf of the child's own wishes. Furthermore, the current statute allows an attorney appointed to represent the child to act as a GAL. The Subcommittee has recognized that at least children over 12 should have their interests represented by an attorney that is acting as a zealous advocate.

Indeed, a review of the legislative history of the CPA reveals that Idaho's policy was once to provide traditional, client-centered counsel to children before instituting the GAL program in the 1980s. In 1976, the original CPA, designated as I.C. § 16-1618, accounted for the child's absolute right to counsel and a qualified right to a GAL.

> Without affecting the right to counsel of parents, guardian or other legal custodian, the court shall appoint separate counsel for the child to serve at each stage in proceedings under this act and to act as guardian ad litem when it appears to the court that the interests of the child are not being fully represented by another party to the action and that party has retained or had counsel appointed.[3]

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[1] *Id.* at 1360 (emphasis added).
[2] *Id.* at 1360-1361.
[3] 1976 Idaho Session Laws ch. 204.

In 1982, I.C. § 16-1618 was amended to make a few technical changes and to provide for the parents' qualified right to counsel. However, the substance of the child's absolute right to counsel and qualified right to a GAL remained the same.

> ~~Without affecting the right to counsel of parents, guardian or other legal custodian, t~~The court shall appoint separate counsel and in appropriate cases a guardian ad litem for the child or children to serve at each stage in proceedings under this ~~act and to act as guardian ad litem when it appears to the court that the interests of the child are not being fully represented by another party to the action and that party has retained or had counsel appointed.~~ chapter. The court may appoint independent counsel for a parent if the proceedings are complex, counsel is necessary to protect the parent's interests adequately and such interests are not represented adequately by another party.[1]

In 1985, with a subtle revision, the rights of the child were drastically altered. Section 16-1618 was amended to require an attorney or a GAL to be appointed for the child. While a judge could still appoint either an attorney or a GAL, or both, he or she was no longer required to.

> The court shall appoint separate counsel and/or in appropriate cases a guardian ad litem for the child or children to serve at each stage in proceedings under this chapter. The court may appoint independent counsel for a parent if the proceedings are complex, counsel is necessary to protect the parent's interests adequately and such interests are not represented adequately by another party.[2]

A few years later in 1989, section 16-1618 was amended again to make appointment of a GAL mandatory and the appointment of counsel discretionary.

> (a) In any proceeding under this chapter t~~T~~he court shall appoint ~~separate counsel and/or in appropriate cases~~ a guardian ad litem for the child or children to serve at each stage ~~in~~ of the proceeding~~s under this chapter~~ and in appropriate cases may appoint counsel to represent the child or guardian. The court may appoint independent counsel for a parent if the proceedings are complex, counsel is necessary to protect the parent's interests adequately and such interests are not represented adequately by another party.

[1] 1982 Idaho Session Laws ch. 186.
[2] 1985 Idaho Session Laws ch. 177.

> (b) If a court does not have available to it a guardian ad litem program or a sufficient number of guardians ad litem, the court may shall appoint separate counsel for the child.[1]

This section of the CPA took its contemporary form in 2001 when it was amended one last time to provide for the GAL's qualified right to an attorney in the proceedings. It was also amended to allow an attorney appointed to represent the child to act in the capacity of the GAL.

> (a) In any proceeding under this chapter the court shall appoint a guardian ad litem for the child or children to serve at each stage of the proceeding and in appropriate cases ~~may~~ shall appoint counsel to represent the ~~child or~~ guardian~~. The court may appoint independent counsel for a parent if the proceedings are complex, counsel is necessary to protect the parent's interests adequately and such interests are not represented adequately by another party~~, and in appropriate cases, may appoint separate counsel for the child.
>
> (b) If a court does not have available to it a guardian ad litem program or a sufficient number of guardians ad litem, the court ~~may~~ shall appoint separate counsel for the child. For a child under the age of twelve (12) years the attorney will have the powers and duties of a guardian ad litem. For a child twelve (12) years of age or older, the court may order that the counsel act with or without the powers and duties of a guardian ad litem.[2]

The current version of this provision was re-designated as I.C. § 16-1614 in 2005.[3]

Courts are beginning to suggest that a GAL may not satisfy a child's constitutional right to counsel because the GAL acts in the best interest of the child, not as the child's zealous advocate.[4] In other words, it appears that the policy once adopted in Idaho is emerging nationwide. In recognition of the importance of client-directed counsel for children, and of the inherent conflict of interest involved when an attorney acts as a GAL, the Subcommittee has recommended that the statute be amended. The proposed amendments to § 16-1614 will allow children to have a voice in the critical decisions being made about their lives in child protection actions and prevent problematic conflicts of interest with their attorneys.[5]

[1] 1989 Idaho Session Laws ch. 281.
[2] 2001 Idaho Session Laws ch. 107.
[3] 2005 Idaho Session Laws ch. 391.
[4] *See, e.g., Illinois v. Austin M.*, Ill. S.Ct. No. 111194 Aug 30, 2012.
[5] See Appendix, pp. 21-22.

D.
CREATION OF AN INTERIM COMMITTEE TO STUDY POTENTIAL APPROACHES TO SYSTEMATIC INDIGENT DEFENSE REFORM

The Subcommittee's final recommendation is reflective of the reality that, since *Gideon*, the provision of public defense services throughout the country has been significantly transformed. "A patchwork of public defense delivery systems has evolved in state and local jurisdictions reflecting wide differences in structure, scope, and quality."[1] This has created a system in which a person's access to justice varies greatly depending on the zip code or county in which he or she was accused of an offense.[2]

Prior to 1976, only thirteen states funded all or a significant part of their indigent defense systems.[3] The most significant trend since, however, has been "the movement toward some type of state oversight for indigent defense services that relies on statewide standards and often state funds to ensure that uniform, quality representation is provided in every county in the state."[4]

Now, all but ten states[5] have some form of state oversight of their trial-level public defense delivery systems. These forty states either have a state-operated and funded model (with or without a supplemental commission) or a model where localities maintain a certain degree of control but a commission provides overall direction and may even develop standards and guidelines for the operation of the local programs. Out of these forty states, twenty-five have commissions, boards, or councils that serve in a policymaking, managerial, or oversight capacity in relation to the public defense delivery systems that are administered at the local level. "A commission may monitor costs and caseloads, but a more active commission may also develop a number of indigent defense standards and oversee compliance with those standards."[6] However, only four of these forty systems (Indiana, Nebraska, Ohio, and Texas) are funded primarily (50% or more) by the counties.

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[1] U.S. Department of Justice, Bureau of Justice Assistance, National Legal Aid & Defender Association & Bureau of Justice Assistance Criminal Courts Technical Assistance Project at American University, *Public Defense Reform Since Gideon: Improving the Administration of Justice by Building on Our Successes and Learning From Our Failures—A Public Defense Leadership Focus Group,* 4 (U.S. Department of Justice 2008).

[2] Justice Policy Institute, *System Overload: The Costs of Under-Resourcing Public Defense* 16 (Justice Policy Institute 2011).

[3] U.S. Department of Justice, Bureau of Justice Assistance, National Legal Aid & Defender Association & Bureau of Justice Assistance Criminal Courts Technical Assistance Project at American University, *supra* n. 1, at 8.

[4] Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & Contemporary Problems 48, 48 (1995).

[5] Alabama, Arizona, California, Idaho, Maine, Michigan, Mississippi, Pennsylvania, South Dakota, and Utah (Note: Michigan is currently considering a commission model).

[6] The Spangenberg Group, *State Indigent Defense Commissions*, 4 (ABA 2006).

In 1989, the state of Indiana established the Indiana Public Defender Commission (IPDC) to assist counties with the cost of indigent defense.[1] The IPDC initially established standards for appointment, workload, and qualification of counsel in capital cases. Upon compliance with state-mandated standards, counties are reimbursed by the state for 50% of the cost of defense in capital cases.[2] In 1994, however, the IPDC's scope was expanded and counties became eligible for reimbursement of 25% of defense costs in non-capital felony and juvenile delinquency cases so long as they complied with the standards promulgated by the IPDC. The reimbursement amount has since been raised to 40% for non-capital felony and juvenile cases.

The IPDC is comprised of eleven members who meet on a quarterly basis.[3] The IPDC also employs two full-time staff attorneys to assist the commission with its efforts. Members of the IPDC may not be law enforcement officers or court employees.[4] The IPDC also designates its own chair.[5] Pursuant to Indiana Code §33-40-5-4, the IPDC "shall adopt guidelines and standards for indigent defense services under which the counties will be eligible for reimbursement." Among other things, the IPDC is authorized to adopt guidelines regarding the determination of indigency, the issuance and enforcement of reimbursement orders, qualifications of public defense attorneys and contractors, rates of compensation, and caseload standards.[6] Along with developing these guidelines, the IPDC's primary duty is to review and approve requests from county auditors for state reimbursement of costs on a quarterly basis. "By exerting its authority through the control of state funds, the commission is able to create a meaningful incentive for the counties to improve their indigent defense systems."[7]

Nebraska's reform efforts resemble Indiana's. The Nebraska Commission on Public Advocacy (NCPA) was created in 1995 to provide "resources to assist counties in fulfilling their obligation to provide for effective assistance of counsel for indigent persons" charged with first-degree murder and serious violent or drug-related felonies, including juvenile cases at trial and on direct appeal.[8] The NCPA also has an ancillary responsibility to provide civil legal services to eligible low-income persons through its Civil Legal Services Program (CLSP).[9]

The NCPA is composed of nine members appointed by the governor.[10] Members may not be prosecutors, law enforcement officials, or judges at any time during the term of office and "shall be committed to the principle of

[1] The Spangenberg Group, *State and County Expenditures for Indigent Defense Services in Fiscal Year 2002*, 10-11 (ABA 2003).
[2] *Id.*
[3] Ind. Code. § 33-40-5-3 (2011).
[4] Ind. Code. § 33-40-5-2 (2011).
[5] Ind. Code. § 33-40-5-3 (2011).
[6] Ind. Code. § 33-40-5-4(2)(2011).
[7] The Spangenberg Group, *supra* n. 1, at 9.
[8] Neb. Rev. Stat. § 29-3923 (2008).
[9] Neb. Rev. Stat. § 29-3927(f) (2008).
[10] Neb. Rev. Stat. § 29-3924 (2008).

providing indigent defense services . . . free from unwarranted judicial or political influence."[1] With regard to its provision of civil legal services, the NCPA essentially administers funds and grants that are awarded to certain service providers for the provision of civil legal services to eligible low-income persons.[2] As to its duty to provide resources to counties for representation of indigent persons in certain criminal matters, the NCPA is required to: adopt guidelines and standards for county indigent defense systems relating to the use and expenditure of funds appropriated to reimburse counties which qualify for reimbursement; attorney eligibility and qualifications for court appointments; compensation rates for salaried public defenders, contracting attorneys, and court-appointed attorneys; maximum caseloads; rules for appointing counsel and awarding defense contracts; conflicts of interest; and continuing legal education.[3] Furthermore, the NCPA is granted the authority to "adopt and promulgate rules and regulations for its organization and internal management and rules and regulations governing the exercise of its powers and the fulfillment of its purpose."[4]

The counties qualify for reimbursement by presenting to the NCPA: (a) a plan describing how the county intends to provide indigent defense services in felony cases; (b) a statement of intent declaring that the county intends to comply with the standards set by the commission for felony cases and that the county intends to apply for reimbursement, and (c) a projection of the total dollar amount of expenditures for that county's indigent defense services in felony cases for the next fiscal year.[5] The NCPA is statutorily authorized to "conduct whatever investigation is necessary and may require certifications by key individuals in the criminal justice system, in order to determine if the county is in compliance with the standards."[6]

If a county is certified by the NCPA as having met the standards it established for felony cases, the county is eligible for reimbursement in an amount equal to one-fourth of the county's actual expenditures for indigent defense services in felony cases.[7] Upon certification, the respective county clerks may submit, on a quarterly basis, a certified request for reimbursement from funds appropriated by the legislature.[8] Note that the reimbursements are strictly meant to incentivize compliance with the guidelines and standards promulgated by the NCPA. The standards are "intended to be used as a guide for the proper methods of establishing and operating indigent defense systems" and are "not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction."[9]

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[1] *Id.*
[2] Neb. Rev. Stat. § 25-3002 (2008).
[3] Neb. Rev. Stat. § 29-3927(1)(g) (2008).
[4] Neb. Rev. Stat. § 29-3927(1)(a) (2008).
[5] Neb. Rev. Stat. § 29-3933(2) (2008).
[6] Neb. Rev. Stat. § 29-3933(3) (2008).
[7] *Id.*
[8] *Id.*
[9] Neb. Rev. Stat. § 29-3927(2)(2008).

Ohio utilizes a public defense provision mechanism that is essentially analogous to that of Indiana and Nebraska, *i.e.*, the "carrot" approach. However there are notable differences. For example, as opposed to Indiana and Nebraska, counties in Ohio may be reimbursed for up to 50% of public defense costs even in minor misdemeanors.[1] Furthermore, counties are reimbursed on a monthly basis.[2] Perhaps most notably, the commission appoints a state public defender who is charged with, among other things, supervising the compliance of public defenders with standards and guidelines established by the commission and reimbursing the counties that comply.[3]

The commission is composed of nine members.[4] Four of the members are appointed by the governor with the advice and consent of the senate, "two of whom shall be from each of the two major political parties."[5] Four more members are appointed by the state Supreme Court, again, of which two shall be from each of the two major political parties.[6] The ninth member serves as the chair and is appointed by the governor with the advice and consent of the senate.[7] Only five of the members, including the chair, are required to be attorneys admitted to practice law in Ohio.[8]

The commission's primary powers and duties involve establishing rules for the conduct of public defenders, whether they are county public defenders or court-appointed counsel. These rules include, but are not limited to: standards of indigency; standards for the hiring of outside counsel; standards for contracts by public defenders with law schools, legal aid societies, and nonprofit organizations for providing counsel; standards for the qualifications, training, and size of the legal and supporting staff for a public defender, facilities, and other requirements needed to maintain and operate an office of a public defender; caseload standards; procedures for the assessment and collection of the costs of legal representation provided by public defenders or appointed counsel; standards and guidelines for determining whether a client is able to make an up-front contribution toward the cost of his or her legal representation and procedures for collection of such contributions; and standards for contracts between boards of county commissioners and municipal

[1] Ohio Rev. Code Ann. §120.18 (2008); *see Ohio Public Defender Standards and Guidelines for Appointed Counsel Reimbursement*, Section 1(N); *County Public Defender Office Reimbursement Standards*, Section 3(H). "Reimbursement will be made for minor misdemeanors when the minor misdemeanor is among two or more charges in a single case for which one of the other charges carries the possibility of jail time. Otherwise, no reimbursement will be made for representation in minor misdemeanor cases without prior written approval from the Ohio Public Defender."
[2] Ohio Rev. Code Ann. §120.18 (2008).
[3] Ohio Rev. Code Ann. §120.04 (2008).
[4] Ohio Rev. Code Ann. §120.01 (2008).
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] Ohio Rev. Code Ann. §120.01 (2008).

corporations for the legal representation of indigent persons charged with violations of the ordinances of the municipal corporations.[1]

A county may request reimbursement of up to 50% of public defense costs from the state public defender each month.[2] Each request for reimbursement must include a certification by the county public defender that the persons represented during the period covered by the report were indigent and, for each person represented during that period, a financial disclosure form completed by the person on a form prescribed by the state public defender.[3] Upon compliance with the standards and guidelines established by the commission, the state public defender prepares a voucher for up to 50% of the costs for the period of time covered by the certified report.[4] If a county fails to maintain the standards and guidelines established by the commission, the commission is required to notify the appropriate board of county commissioners and the public defender that it has failed to comply.[5] Unless the county public defender corrects the conduct to conform to the rules and standards within ninety days after the date of the notice, the state public defender may deny payment of all or part of the county's reimbursement.[6]

In 2001, Texas passed the Fair Defense Act which established its first statewide body to administer state appropriations and guidelines for indigent defense provision at the county level.[7] On September 1, 2011, significant amendments[8] to the Act took effect which, in pertinent part, require counties to report certain information in exchange for monetary support in the form of grants.[9] The Texas Indigent Defense Commission (TIDC) provides technical support to the counties as well as fiscal support. Again, this support is conditional upon compliance with certain mandatory reporting requirements promulgated by the TIDC.

The TIDC is composed of thirteen members, eight *ex officio* members and five members appointed by the governor with the advice and consent of the state senate.[10] The *ex officio* members include the chief justice of the supreme court, the presiding judge of the court of criminal appeals, one of the members of the senate who is designated by the lieutenant governor, a member of the house of representatives appointed by the speaker of the house, a court of appeals justice who is designated by the governor, one of the county court judges who is designated by the governor, one other member of the senate

[1] Ohio Rev. Code Ann. §§ 120.03(B)(1)-(9) (2008). Note that the last power/duty enumerated suggests that the counties may charge cities for the cost of providing indigent defense services to individuals charged with violation of city ordinances.
[2] Ohio Rev. Code Ann. § 120.18(A) (2008).
[3] *Id.*
[4] *Id.*
[5] Ohio Rev. Code Ann. § 120.18(B) (2008).
[6] *Id*.
[7] Tex. Sen. 7, 77th Leg. (June 2001).
[8] Tex. H. 1754, 82d Leg. (May 2011).
[9] Tex. Govt. Code Ann. §§ 79.035-79.036 (2011).
[10] Tex. Govt. Code Ann. §§ 79.013-79.014 (2011).

appointed by the lieutenant governor, and the chair of the House Criminal Jurisprudence Committee.[1]

The other members of the TIDC include one member who is a district judge serving as a presiding judge of an administrative judicial region, one member who is a judge of a county court or who is a county commissioner, one member who is a practicing criminal defense attorney, one member who is a chief public defender or the chief public defender's designee, who must be an attorney employed by the public defender's office, and one member who is a judge of a county court or who is a county commissioner of a county with a population of 250,000 or more.[2] Evidently, there is no prohibition that judges serve on the commission, as there are at least five judges required to serve by statute. However, the statute is silent as to prosecutors and law enforcement officials, though certain lobbyists are prohibited from serving on the commission.[3] Also, the commission appoints its own chair from among its members.[4]

The commission is statutorily required to develop policies and standards for providing legal representation and other defense services to indigent defendants at trial, on appeal, and in post-conviction proceedings.[5] The policies and standards *may* include performance standards and qualification standards for counsel appointed to represent indigent defendants. As to qualification standards, the commission is authorized to develop qualifications commensurate with the seriousness of the nature of the proceeding, qualifications appropriate for representation of mentally ill defendants and noncitizen defendants, successful completion of relevant continuing legal education programs, and testing and certification standards.[6]

The commission is also authorized to create standards for governing the following: appropriate caseloads for counsel appointed to represent indigent defendants; whether a person accused of a crime or juvenile offense is indigent; the organization and operation of an assigned counsel program; the organization and operation of a public defender's office consistent with recognized national policies and standards; indigent defense services under a contract defender program consistent with recognized national policies and standards; the reasonable compensation of counsel appointed to represent indigent defendants; the availability and reasonable compensation of providers of indigent defense support services for counsel appointed to represent indigent defendants; the operation of a legal clinic or program that provides legal services to indigent defendants and is sponsored by a law school approved by the supreme court; the appointment of attorneys to represent children; the organization and operation of a managed assigned counsel program consistent with nationally recognized policies and standards; and other policies and

[1] Tex. Govt. Code Ann. § 79.013 (2011).
[2] Tex. Govt. Code Ann. § 79.014 (2011).
[3] *Id.*
[4] Tex. Govt. Code Ann. § 79.015 (2011).
[5] Tex. Govt. Code Ann. § 79.034(a) (2011).
[6] *Id.*

standards for providing indigent defense services as determined by the commission to be appropriate.[1]

Again, the TIDC provides technical support to the counties as well as fiscal support in the form of grants, which are conditional upon compliance with certain reporting requirements promulgated by the TIDC. Essentially, Texas counties have a two-pronged reporting requirement. First, counties must submit reporting "plans" regarding indigent defense information.[2] The commission is then mandated to "use the information reported by a county to monitor the effectiveness of the county's indigent defense policies, standards, and procedures and to ensure compliance by the county with the requirements of state law relating to indigent defense."[3] The baseline requirements of the county plans require counties to affirmatively report how/if they are conducting prompt and accurate "magistration proceedings;" determining indigency according to standards; establishing minimum attorney qualifications; appointing counsel promptly; instituting fair, neutral, and non-discriminatory attorney selection processes; and utilizing standardized forms and applications.[4]

Second, counties must provide the commission with copies of all formal and informal rules as well as expenditure reports.[5] Specifically, with regard to rules, counties must submit "a copy of all formal and informal rules and forms that describe the procedures used in the county to provide indigent defendants with counsel," any revisions to rules or forms previously provided, or verification that the rules and forms previously submitted still remain in effect."[6] As to the expenditure reports, counties must submit "information showing the total amount expended by the county to provide indigent defense services and an analysis of the amount expended by the county."[7]

As mentioned above, the TIDC's enforcement mechanism is the withholding of grant funds. According to Wesley Shackelford, TIDC's Deputy Director/Special Counsel, doing so "is pretty straightforward when a county doesn't submit reports correctly or timely. It's trickier when a monitoring visit reveals areas of practice that do not comply with law."[8] So far, according to Shackelford, the TIDC has not had to withhold funds, though it has come "close" when a county "did not make sufficiently fast progress on correcting . . . deficiencies."[9] Though the TIDC has only contributed 15% of the total cost of indigent defense in the state, it provides close to $30 million each year.[10]

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[1] *Id.*
[2] Tex. Govt. Code Ann. § 79.035(a) (2011).
[3] *Id.*
[4] Tex. Code of Crim. Proc. § 26.04 (2011).
[5] Tex. Govt. Code Ann. § 79.036(a)-(e) (2011).
[6] *Id.*
[7] *Id.*
[8] E-mail from Wesley Shackelford, Tex. Indigent Def. Commn., to Jared Hoskins, Hoskins Law & Policy Group, PLLC, *Question Regarding Indigent Defense Plans*, 1 (Aug. 22, 2011) (copy on file with recipient).
[9] *Id.*
[10] *Id.*

In terms of indigent defense delivery, "most indigent defense experts agree that independence and meaningful statewide oversight of indigent defense services enhances the quality of services rendered within that state's system."[1] According to these experts, politically independent bodies such as commissions should be established to oversee defender, assigned counsel, or contract programs in the various states.[2] Indeed, the clear trend over the last thirty years has been in this direction. In light of this trend, and with the experiences of the other states in mind, several options were considered by the Subcommittee for adoption in Idaho: (A) a mandatory compliance model; (B) an incentivized compliance model; (C) a strategic planning model; (D) a tech-support model; (E) a mixed model; and (F) maintenance of the status quo.

With a mandatory compliance model, a statute could simply demand that counties comply with certain standards and requirements or it could delegate authority to a commission to draft administrative rules demanding as much. In theory, the pros of such a model are its uniformity, clarity, and accountability. In practice, however, such a model could be politically unpopular.

A more demanding commission could, among other things, establish minimum attorney qualifications, training requirements, caseload and/or workload limits, data collection and reporting requirements, and model contract requirements.[3] In comparison, the Georgia Public Defender Council creates extensive standards and/or requirements regarding staff size, qualifications, caseloads, training, performance, compensation, determination of indigence, definition of a "case," and use of contract systems.[4] However, as discussed above, Georgia's system is administered and funded primarily at the state level, at least for felony and juvenile cases.[5] Because the provision of public defense at the local level is administered and primarily funded by the state, extensive statewide standards are politically feasible in Georgia.

A less demanding commission model, on the other hand, may only mandate compliance with, say, certain periodic reporting requirements. For example, the commission could mandate that counties ensure that certain data are collected and reported, or that the counties engage in some form of self-evaluation. The Arkansas Public Defender Commission, for instance, is authorized to require annual reports regarding expenditures, caseloads, and the status of cases from each local public defender office.[6] Similarly, as discussed in detail above, Texas tasks its indigent defense commission with requiring counties to report "plans" as well as rules and expenditure data.[7] Arkansas's

[1] The Spangenberg Group, *State Indigent Defense Commissions*, i (ABA 2006).
[2] American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice—A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings*, 20 (ABA 2004).
[3] *Id*.
[4] Ga. Code Ann. §§ 17-12-1—17-12-128.
[5] Counties in Georgia may contract with the state for provision of public defense systems in misdemeanor cases.
[6] Ark. Code. Ann. § 16-87-203 (2011).
[7] Tex. Govt. Code Ann. §§ 79.035-79.036 (2011).

system is administered and funded at the state level while Texas's, again, is not.

In Idaho, without state administration or funding of indigent defense, such a mandatory model would amount to an unfunded mandate to counties. How "unfunded" the mandate is, of course, depends on the extent of the commission's demands. In other words, simply demanding the counties to abide by caseload limits without the provision of supplemental funding could be costly to counties, while only requiring counties to file uniform reports detailing expenditure and caseload data would have minimal fiscal impact.[1] Thus, the political fallout could be minimized by lessening the demands of the mandatory standards or requirements.

Regardless of the practical and political implications of simply mandating counties to comply with standards or procedures, the state—indeed—has the inherent authority to direct a county to act simply by virtue of the unitary relationship between the state and the counties. "It is . . . well settled in this jurisdiction that counties are but arms of the state, merely subdivisions of the state, created or superimposed by the sovereign power of the state of its own sovereign will."[2] That a county is statutorily mandated to abide by caseload limits or to report expenditures, however, does not necessarily guarantee that a county will ultimately do so.

In the event a county is unable or unwilling to comply with mandatory standards or requirements, the state would not be without its mechanisms to compel compliance.[3] Idaho Code § 34-212(1), for example, allows any person with knowledge of a county clerk's failure to comply with election laws to notify the prosecuting attorney of the county. Also, the secretary of state may apply to the appropriate district court for a writ of mandamus to compel the county clerk to comply with a directive or instruction prepared and distributed or given under authority of the secretary of state.[4] Furthermore, Idaho Code § 7-302 authorizes courts to issue writs of mandamus to "any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." A writ of mandamus "will lie if the officer against whom the writ is brought has a clear legal duty to perform and if the desired act sought to be compelled is ministerial or executive in nature, and does not require the exercise of discretion."[5] Thus, so long as a county's duty to comply with standards or

[1] For example, Idaho Code § 19-864 already requires counties to report certain information. With the current proposed amendments, this statute will apply to all attorneys providing public defense services on behalf of a county. It could potentially be amended to require, perhaps, more extensive data reporting with little fiscal impact.

[2] *Henderson v. Twin Falls County*, 56 Idaho 124, 132 (1935); *see also Hellar v. Cenarrusa*, 106 Idaho 571 (1984).

[3] During the September 8, 2010 Subcommittee meeting, discussion was held regarding the withholding of locally-derived funding from speeding tickets, civil filing fees, DUI fees, etc. as a potential enforcement mechanism.

[4] Idaho Code § 34-213(1).

[5] *Cowles Publishing Co. v. The Magistrate Court of the First Judicial District of the State of Idaho, County of Kootenai*, 118 Idaho 753, 760 (1990).

procedures is not discretionary, a writ of mandamus is a viable option to enforce compliance.

Other states have utilized mandamus provisions in their commission enabling statutes in anticipation of the very likely political possibility that counties may be unable or unwilling to comply. For instance, in Nebraska, "the commission may conduct whatever investigation is necessary and may require certifications by key individuals in the criminal justice system, in order to determine if the county is in compliance with the standards."[1] Also, Texas grants its judicial council enforcement power through writs of mandamus and charges the attorney general with the responsibility of prosecuting mandamus actions at the request of the council.[2] Thus, in Idaho, an enabling statute could specifically provide for writs of mandamus or otherwise direct counties to cooperate.

As opposed to a mandatory compliance model, an incentivized compliance model relies on the granting and withholding of funds or support to incentivize voluntary compliance. As discussed above with regard to Indiana, Nebraska, Ohio, and Texas, such incentive-based commissions are tasked with developing standards and requirements, monitoring the compliance of counties, and either granting or withholding funds depending on compliance. Politically, an incentive-based approach to indigent defense oversight in Idaho would be more feasible because localities would maintain local control without the additional burden of unfunded mandates from the state. Yet, if counties voluntarily *choose* to comply, they would qualify for receipt of state benefits, *e.g.*, funding or in-kind services and support.

The effectiveness of an incentive-based commission model is limited by a number of interrelated factors.[3] One important factor is whether the commission is willing and able to control the funds or benefits and/or to withhold them from counties in the event of noncompliance. Unless the funds or services are *actually* contingent upon compliance with the standards or procedures developed by the commission then there is no disincentive for noncompliance. Counties may consciously disregard the standards knowing that they will receive the state benefits regardless. Nonetheless, even if a county does not comply, a commission may overlook the noncompliance because it realizes that "removing supplemental state funding from a struggling county program for failing to make improvements will only lessen indigent defense services in the county."[4]

A second factor is the amount of funding or the level of services and support available to complying counties. Unless state funds cover a significant portion of the counties' indigent defense expenditures, compliance with standards and systemic improvements may be cost-prohibitive. Counties will certainly contemplate whether the funds provided by the state sufficiently defray the additional cost of complying with standards. If the state benefits do

[1] Neb. Rev. Stat. § 29-3933(3) (2008).
[2] Tex. Govt. Code Ann. § 71.035(c) (2011).
[3] The Spangenberg Group, *State Indigent Defense Commissions,* 4 (ABA 2006).
[4] *Id*.

not sufficiently supplement county funds, and there is no mechanism to otherwise compel compliance, counties may simply choose to opt out of the system. "The greater the state funding, the greater the influence a commission is normally able to have over the quality of indigent defense services being provided among the localities."[1]

Another factor is the ability of the commission and its staff to review the performance of the counties' indigent defense programs, *i.e.*, the commission's institutional capacity. This factor is necessarily dependent upon the resources available to the commission and the quality and reliability of the indigent defense data. Even if the commission has the resources available to make compliance with standards and procedures sufficiently worthwhile, it cannot function if it does not have the staff support to conduct the administration, research, review, and analysis as necessary. The amount of staff needed to adequately support the commission, however, depends on the scope of the commission's activities. Similarly, the institutional capacity to conduct quantitative analysis depends on the quality, consistency and, sufficiency of data collected. For example, the commission is only able to conduct meaningful analysis if the data types (*e.g.*, interval, ratio, or nominal) are consistent throughout the sample over time. Thus, a commission's institutional capacity is affected by the amount of staff support and the quality of the data available to it.

Depending on the scope of the commission's activities, the relative weight and importance of these factors vary. For instance, if compliance with standards or procedures has little fiscal impact on counties, they may comply even if contingent state funds cover very little of the counties' indigent defense expenditures. Though the incentives for compliance may not be significant enough for counties to comply with caseload controls, even simply the availability of training or the mere access to a listserv may be attractive enough for counties to comply with data reporting requirements. Thus, whether the amount of funding, services, or support is enough to incentivize comprehensive compliance and whether the funding, services, and support may help counties improve their public defense delivery are two different questions. "The existence of even a partial commission is usually preferable to none at all."[2]

In Idaho, mitigating the limitations of an incentivized compliance model could be approached in a number of ways. For example, whether the provision of state benefits is actually contingent upon compliance with the commission's standards is a policy question that could be resolved and articulated from the outset. In other words, assuming an Idaho commission will have funds or services available to offer in exchange for voluntary compliance with standards, whether or not the commission will withhold the

[1] *Id.* Also, during the September 8, 2010 Subcommittee Meeting, David Caroll of the NLADA expressed concern about the relative ineffectiveness of systems that rely on primarily county funding.
[2] The Spangenberg Group, *State Indigent Defense Commissions*, 11 (ABA 2006).

benefits in the event of non-compliance could be provided for by statute or administrative rule.

For example, Indiana's statute provides for mandatory reimbursement upon compliance but it does not specifically provide for mandatory withholding in the event of non-compliance.[1] An Idaho statute or rule providing for the mechanics of reimbursement could reciprocally provide for the event of non-compliance. For instance, a statute or rule could read, "the commission may not authorize a disbursement of funds or provision of benefits pursuant to this section upon a finding by the commission that a county is not in compliance with the guidelines and standards set forth herein." With no discretion on whether to withhold benefits, there would be no debate over the statutory duty of the commission and no ambiguity regarding the privileges available to the counties.

The capacity of the commission to effectively monitor compliance and administer funding could be increased by formalizing uniform and comprehensive data reporting requirements. As noted above, Idaho Code § 19-864 already requires counties to report certain information. This statute could be amended so that it applies to all attorneys providing public defense services on behalf of a county and so it requires uniform data reporting.[2] With such amendments, all public defenders—county public defenders, contractors, and appointed counsel—would report the same information. Such an incremental step would drastically increase a commission's ability to engage in meaningful, though perhaps limited, analysis. Taken further, statutory reporting requirements could be conformed or adapted to Idaho's ISTARS system to minimize redundant data reporting, gathering, and analysis. In Texas, for example, the commission has the duty to develop statewide requirements for counties relating to reporting indigent defense information and the requirements must include "provisions designed to reduce redundant reporting by counties and provisions that take into consideration the costs to counties of implementing the [requirements] statewide."[3]

Perhaps the most significant factor that could limit Idaho's ability to successfully implement a compliance-based commission model would be whether the funds provided by the state sufficiently defray the additional cost of compliance. This factor is not static, however. Though at the outset an Idaho commission may only have minimal funds or services available to provide to counties as an incentive, those amounts could vary with time and with reform efforts. With better economic times, of course, comes more revenue in the general fund. Also, filing fees, surcharges, and other dedicated funds could be garnered to support the efforts of the commission. User fees (perhaps consisting of membership dues assessed to counties or amounts

[1] Pursuant to § 40-6-5, Indiana Code, "upon certification by a county auditor and a determination by the public defender commission that the request is in compliance with the guidelines and standards set by the commission, the commission *shall* quarterly authorize an amount of reimbursement due the county" (emphasis added).
[2] See Appendix, p. 9.
[3] Tex. Govt. Code Ann. § 79.035(a) (2011).

recouped from indigent defendants upon disposition of their cases) may be collected. What is more, grants and other charitable donations could be sought. So long as the legal framework exists, such as the creation of a public defense fund by statute,[1] revenue from different sources could be placed in the fund for use by the commission as—or if—it becomes available. What is more, the enabling statute could provide for a duty to seek and explore additional funding opportunities.

Another way to maximize commission funds would be to correspondingly reduce its cost of operation. In order to reduce the fiscal impact of a commission, whether mandatory or voluntary, some jurisdictions attach commission staff to other government agencies. For example, in Texas the commission is "administratively attached" to the Texas Office of Court Administration. In accordance with statute, "the office of court administration shall provide administrative support services, including human resources, budgetary, accounting, purchasing, payroll, information technology, and legal support services, to the commission as necessary."[2] Also, in Indiana, the Division of State Court Administration of the Supreme Court provides general staff support to its commission.[3]

Idaho utilizes a similar mechanism for the provision of administrative support to some of its executive agencies. For example, the Idaho Legislative Services Office provides administrative and technical support to the Commission for Reapportionment.[4] Also, the Idaho Department of Labor provides administrative support to the Commission on Human Rights.[5]

As in Indiana and Texas, the administrative staff of Idaho's commission could be attached to, say, the Administrative Office of the Courts. With little administrative costs, whatever revenue does become available to the commission could be primarily used for incentivizing compliance of the counties. Also, such an approach would augment the state's "footprint" in the realm of public defense regulation, which could be politically appeasing to the counties, the general public, and the political players involved.

Though the ultimate success of an incentivized compliance model in Idaho is limited by several factors, the effect of these factors can be mitigated. The willingness of the commission to actually withhold funds in the event of non-compliance can be controlled by statutorily requiring the commission to do so. As to the institutional capacity of the commission, the ability to conduct meaningful analysis could be bolstered by standardizing uniform reporting requirements by statute. Also, compliance could be made more attractive by instituting the legal framework of an indigent defense fund to hold any and all revenue obtained and then by exploring multiple sources of revenue to place in the fund. What is more, reducing the administrative cost of the commission by

[1] See Neb. Rev. Stat. § 25-3002 (2008); and Tex. Govt. Code Ann. § 79.031 (2011).
[2] Tex. Govt. Code Ann. § 79.033(b) (2011).
[3] Ind. Code. § 33-40-5-5 (2011).
[4] State of Idaho, *Commission for Reapportionment*, http://www.legislatureidaho. gov/redistricting/.redistricting.htm.
[5] Idaho Code §§ 72-1333(6), 67-5905 (2011).

administratively attaching it to another agency would maximize the funds available to the commission to incentivize compliance.

To the extent policymakers cannot initially agree on the precise role of a mandatory or incentive-based model, provide for the creation or maintenance of such a commission, or otherwise institute systematic changes to the current system, a strategic planning model could serve as bridge between the status quo and future indigent defense policy. In many states, the efforts of a strategic planning body such as a "study commission" or "task force" have even been the catalyst for the creation of state indigent defense commissions.[1] The adoption of a strategic planning model would be an incremental step toward meaningful statewide indigent defense reform.

"The most successful study commissions have critically examined the issues confronting the state's indigent defense system and made thoughtful recommendations for change."[2] As such, a strategic planning commission's primary focus would be on the analysis of current policy and the formulation and legitimation of new indigent defense policy. In analyzing current policy, the commission could conduct research, surveys, quantitative analysis, or case-weighting studies to identify problems and articulate priorities. The commission could also solicit input from various stakeholders, as "it is crucial for the task force to reach out to all affected parties during the fact gathering process to build allies for support."[3]

In Idaho, a major obstacle to a commission being able to conduct meaningful policy analysis would be the lack of consistent data regarding indigent defense. Currently, Idaho Code § 19-864 only requires public defenders "in counties electing to establish and maintain such an office" to submit annual reports containing the number of persons represented, the crimes involved, the outcome of each case, and the expenditures made.[4] Only county public defender offices, therefore, are statutorily required to report any data. This obstacle could be overcome, as discussed above, by formalizing uniform and comprehensive data reporting requirements. To the extent Idaho Code § 19-864 remains intact, the commission could lead efforts to amend that section or otherwise implement uniform reporting requirements to assist with its strategic planning efforts.

Other such ancillary or preparatory tasks could be handled by a strategic planning commission. For example, the commission could lead efforts to formalize a uniform definition of a "case," which would assist in its data collection and policy analysis efforts. The commission could also engage in advocacy, outreach, grant writing, and fundraising. The South Carolina Office of Indigent Defense, for example, is statutorily authorized to "cooperate and consult with state agencies, professional associations, and other groups concerning the causes of criminal conduct, the rehabilitation and correction of

[1] The Spangenberg Group, *State Indigent Defense Commissions*, 29 (ABA 2006).
[2] *Id*.
[3] *Id*. at 30.
[4] See Appendix, p. 9. With the current proposed amendments, all "defending attorneys" would be required to report data.

persons charged with and convicted of crimes, the administration of criminal justice, and the improvement and expansion of defender services."[1] Also, in Kentucky, the Public Advocacy Commission is directed by statute to "assist the Department for Public Advocacy in ensuring its independence through public education regarding the purposes of the public advocacy system."[2]

A likely hurdle in the creation of such a strategic planning model would be the perception that it is a "big government" approach to solving the problem, particularly if the commission is given little authority and/or responsibility. Similarly, opponents of such a model may criticize the approach on the basis that there may be other *ad hoc* ways to accomplish the same goal without creating an independent government agency. However, the creation of strategic planning commission, even without the ability to implement and enforce substantial standards or procedures, could accomplish much in the pursuit of beneficial indigent defense reform in comparison to other temporary or impromptu approaches.

One important function such a commission could serve is political independence. "The most important role of a successful state oversight body or commission is to insulate the defense function by providing a measure of independence to the indigent defense system from political and judicial influence."[3] Indeed, in its *Ten Principles of a Public Defense Delivery System*, the ABA places political independence at the top of the list. According to the ABA's *Ten Principles*, the public defense function should be independent from political influence.[4] "To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems."[5]

Political independence of the public defense function would be promoted by a strategic planning commission by dispersing the influence from and interaction with the three branches of government. Yet, political independence of a commission "can be fostered not only by the creation of an independent agency, but also by the makeup of the commission and the terms of commission membership."[6] While many states have instituted such indigent defense commissions or boards, and while there are many ways in which states do—or do not—include prosecutors, law enforcement officials, or judges in their membership and in which political neutrality is sought, there are clear trends that should be noted.

As mentioned above, twenty-five states have commissions, boards, or councils that serve in a policymaking, managerial, or oversight capacity in relation to the public defense delivery systems that are administered at the local level. These commissions, boards, or councils—almost without exception—are composed so as to avoid undue political influence consistent

[1] S.C. Code Ann. § 17-3-310(g)(3).
[2] Ky. Rev. Stat. Ann. § 31.015(6)(d).
[3] The Spangenberg Group, *State Indigent Defense Commissions*, i (ABA 2006).
[4] *A.B.A. Ten Principles*, Principle 1.
[5] *Id*.
[6] The Spangenberg Group, *State Indigent Defense Commissions*, 19 (ABA 2006).

with the ABA's first of its *Ten Principles*. However, as mentioned above, this political insulation is achieved in myriad ways.

Some states expressly disallow judges, prosecutors, or law enforcement officials from being members. Ten states—Colorado, Kentucky, Louisiana, Maryland, Massachusetts, Montana, Nebraska, North Dakota, North Carolina, and Oregon—expressly limit the participation of judges, prosecutors, law enforcement officials, and—in some instances—even public defenders in their commissions. For instance, in Colorado, "no member of the commission shall be at any time a judge, prosecutor, public defender, or employee of a law enforcement agency."[1] Furthermore, in Kentucky, the "Public Advocacy Commission shall consist of . . . members, none of whom shall be a prosecutor, law enforcement official, or judge."[2] In North Carolina, even the employees of these officials are excluded. There, "no active prosecutors or law enforcement officials, or active employees of such persons, may be appointed to or serve on the Commission . . . [and] [n]o active judicial officials, or active employees of such persons, may be appointed to or serve on the Commission."[3]

While not all states do so, some—like North Carolina, discussed above—clearly limit only active (as opposed to retired) judges, prosecutors, and law enforcement officials from serving. In Massachusetts, too, "the committee shall not include presently serving judges, elected state, county or local officials, district attorneys, state or local law enforcement officials or public defenders employed by the commonwealth."[4] Nebraska similarly distinguishes by providing that, "at the time of selection or at any time during the term of office, [a member] shall not be a prosecutor, law enforcement official, or judge.[5] North Dakota so too provides. There, "membership of the commission may not include any individual, or the employee of that individual, who is actively serving as a judge, state's attorney, assistant state's attorney, contract counsel or public defender, or law enforcement officer."[6]

Louisiana, on the other hand, has a "look-back" period regarding its exclusion of these individuals. There, "no person shall be appointed to the board that has received compensation to be an elected judge, elected official, judicial officer, prosecutor, law enforcement official, indigent defense provider, or employees of all such persons, within a two-year period prior to appointment."[7]

Although Oregon also prohibits membership of judges, prosecutors, and law enforcement officials on its commission, it does not completely exclude judicial or prosecutorial participation. In Oregon, "the Chief Justice serves as a nonvoting, *ex officio* member" and at least one former prosecutor is required to sit on the commission.[8] It should also be noted that the presence of

[1] Colo. Rev. Stat. § 21-1-101(2).
[2] Ky. Rev. Stat. Ann. § 31.015(1)(a).
[3] N.C. Gen. Stat. § 7A-498.4(d).
[4] Mass. Gen. Laws ch. 211D. § 1.
[5] Neb. Rev. Stat. § 29-3924.
[6] N.D. Cent. Code § 54-61-01(5).
[7] La. Rev. Stat. Ann. § 15:146B(2).
[8] Or. Rev. Stat. Ann. §151.213(2).

judges, prosecutors, and law enforcement officials is not necessarily mutually exclusive. In other words, some states may, for instance, specifically exclude judges while allowing for prosecutors and law enforcement officials to participate. Minnesota is such a state.[1]

While the call for independence of the indigent defense function in the ABA *Ten Principles* seems to focus primarily on the undue influence of the judiciary, it also emphasizes independence from partisan politics. To this end, eight states—Colorado, Connecticut, Indiana, Kansas, Missouri, Nebraska, Ohio, and Washington—seek to avoid partisanship (or at least achieve partisan balance) by providing for representation of the minority political party or by limiting the number of members that belong to one political party. Colorado, for example, statutorily requires its supreme court to "provide for the appointment, terms, and procedure for a five-member public defender commission, no more than three of whom shall be from the same political party."[2] Similarly, in Connecticut, not more than three of the seven members of its commission, other than its chair, may belong to the same political party.[3] Further, in Kansas, not more than five of the nine members of its commission may belong to the same political party.[4]

As opposed to specifically allotting a particular number of seats for each political party, Nebraska merely expresses the intent of achieving political independence for its commission. The applicable Nebraska statute requires that:

> the executive council of the Nebraska State Bar Association shall ensure that the selection process promotes appointees who are independent from partisan political influence . . . . All members shall be committed to the principle of providing indigent defense services and civil legal services to low-income persons free from unwarranted judicial or political influence.[5]

Some jurisdictions account for political insulation, or at least discourage the accumulation of power, by dispersing membership or appointments among the different branches of government. Fifteen states—Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, North Carolina, North Dakota, Ohio, South Carolina, Texas, Virginia, and Washington—have commission members that are either appointed by, or themselves are, individuals representing different branches of government. What is more, seven states—Kansas, Louisiana, Maryland, Missouri, Ohio, Oklahoma, and Texas—require confirmation of the senate for all appointments.

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[1] Minn. Stat. § 611.215(a).
[2] Colo. Rev. Stat. § 21-1-101(2).
[3] Conn. Gen. Stat. § 51-289(c).
[4] Kan. Stat. Ann. §22-4519(d).
[5] Neb. Rev. Stat. § 29-3924.

In Illinois and Kentucky, in particular, members are appointed only by the governor and the courts. The Illinois statute provides for it commission's chair to be appointed by the governor, one member to be appointed by the supreme court, one member to be appointed by each of its five appellate courts, one member to be appointed by the supreme court from a panel of three persons nominated by the state bar association, and one member to be appointed by the governor from a panel of three persons nominated by the Illinois Public Defender Association.[1]

In Louisiana, however, appointments are made by individuals representing all three branches. There, the governor appoints two members and designates the chair, the chief justice of the supreme court appoints two members, and the president of the senate and the speaker of the house of representatives each appoint one member.[2] Similarly, Maryland requires appointments to be made from representatives from all three branches, though eleven of the thirteen members are appointed by the governor.[3]

In North Dakota, not only are there appointments made by representatives from the executive and judicial branches, but members of the legislative branch, themselves, are required to sit on the commission. The North Dakota commission consists of, in relevant part, "two members of the legislative assembly, one from each house, appointed by the chairman of the legislative management."[4] Likewise, the South Carolina commission requires membership of the chairs of the senate and house judiciary committees or their legislative designees.[5] Texas also requires legislators to sit on its commission as *ex officio* members, *e.g.*, one senator designated by the lieutenant governor, a representative appointed by the speaker of the house, and the chair of the House Criminal Jurisprudence Committee.[6]

Indeed, in Washington, even bipartisan legislative membership is accounted for. In Washington, there must be the following legislative members: "two senators, one from each of the two largest caucuses, appointed by the president of the senate; and two members of the house of representatives, one from each of the two largest caucuses, appointed by the speaker of the house of representatives."[7]

In addition to (or, in some instances, in lieu of) political insulation, some states attempt to disperse power geographically by allotting counties, congressional districts, and/or judicial districts specific seats in their commissions. Thirteen states—Arkansas, Georgia, Hawaii, Kansas, Louisiana, Maryland, Minnesota, Nebraska, North Carolina, North Dakota, Oklahoma, South Carolina, and Texas—do so. For example, in Arkansas, no more than two of the seven members of the commission "shall be residents of the same

[1] Ill. Comp. Stat. § 105/4(a).
[2] La. Rev. Stat. Ann. § 15:146B(3).
[3] Md. Crim. Pro. Code Ann. § 16-301(c).
[4] N.D. Cent. Code § 54-61-01(2)(b).
[5] S.C. Code Ann. § 17-3-310(C).
[6] Tex. Govt. Code Ann. § 79.013.
[7] Wash. Rev. Code § 2.70.030(1)(c).

congressional district, and no two (2) members of the commission shall be residents of the same county."[1] In Georgia, the governor must appoint three county commissioners who "shall be from different geographic regions of [the] state."[2] Similarly, in Hawaii, "there shall be at least one member from each of the counties of the State."[3]

Kansas even attempts to account for differences between rural and urban jurisdictions within the state by requiring appointment of "at least one member from each county in the state having a population in excess of 100,000 . . . but not more than five members from such counties."[4] Louisiana, however, simply declares that its board shall be comprised of members "who are geographically representative of all portions of the state."[5]

Still, some jurisdictions seek to achieve diverse membership by, for instance, allotting spots to racial minorities or other disadvantaged groups. For instance, in Louisiana, "the board shall be comprised of members who reflect the racial and gender makeup of the general population of the state."[6] Similarly, in Minnesota, "appointments to the board shall include qualified women and members of minority groups."[7] Also, in North Carolina, "one appointee shall be Native American."[8]

Even further, in Montana, one person who is a "member of an organization that advocates on behalf of a racial minority population" must be appointed along with one person who is a "member of an organization that advocates on behalf of people with mental illness and developmental disabilities" and one person who is "employed by an organization that provides addictive behavior counseling."[9] Also, the Georgia statute provides, more broadly, that:

> in making the appointments of members, the appointing authorities shall seek to identify and appoint persons who represent a diversity of backgrounds and experience and shall solicit suggestions from the State Bar of Georgia, local bar associations, the Georgia Association of Criminal Defense Lawyers, the councils representing the various categories of state court judges in Georgia, and the Prosecuting Attorneys' Council of the State of Georgia, as well as from the public and other interested organizations and individuals within this state.[10]

[1] Ark. Code Ann. § 16-87-202(b).
[2] Ga. Code Ann. § 17-12-3(c).
[3] Haw. Rev. Stat. § 802-9.
[4] Kan. Stat. Ann. § 22-4519(b)(2).
[5] La. Rev. Stat. Ann. § 15:146A(4).
[6] La. Rev. Stat. Ann. § 15:146A(4).
[7] Minn. Stat. § 611.215(b).
[8] N.C. Gen. Stat. § 7A-498.4(b).
[9] Mont. Code Ann. § 2-15-1028(2).
[10] Ga. Code Ann. § 17-12-3(e).

As in Georgia, the Texas appointing authority is required to "attempt to reflect the geographic and demographic diversity of the state" in making its selections.[1]

As this survey of the various approaches to achieving political insulation illustrates, there is no one best way to compose a commission. Yet, there are clear trends which may be emulated as best practices. Out of the twenty-five states with commissions, boards, or councils associated with their indigent defense delivery systems, fifteen of them require appointments to be made by representatives of the different branches of government.[2] Fourteen states prohibit judges from serving. Twelve states exclude prosecutors and an equal number of states disallow law enforcement officials. What is more, as discussed above, ten states prohibit all three—judges, prosecutors, and law enforcement officials—from being appointed. Geographical diversity is also accounted for by thirteen of the twenty-five states.[3]

Institutional memory is another benefit of a strategic planning commission. With *ad hoc* approaches to indigent defense reform, the chances of long-term, sustained efforts are reduced. As opposed to efforts initiated by executive order, for example, a statutory-based commission would exist indefinitely. Its legal framework, internal workings, and succession planning would be well established and, as discussed above, insulated from changes in administrations, political attitudes, and priorities. A stable body with well-defined boundaries and direction would foster the retention and development of knowledge, expertise, and leadership with regard to Idaho's indigent defense policy.

Similarly, reform efforts would benefit from such a commission because of the consolidation of power associated with its statutory authorization. Its function and purposes would be well-defined and whatever authority is granted to the commission, for the most part, would be unfiltered and independent. For example, though any rulemaking authority delegated to the commission would have to conform to normal notice and comment requirements, it could conduct its own research, report its own findings, and seek its own funding without leave from any other organization or official. Also, the centralization and consolidation of indigent defense reform efforts would promote accountability, clarity, unity, and efficiency. Members of the public, counties, attorneys, law enforcement agencies, advocacy groups, policymakers, and other stakeholders would benefit from knowing where to go to interact and advocate in the realm of indigent defense.

Ultimately, a commission based on a strategic planning model could be the impetus behind serious changes in public defense culture and legal structure. As a bridge between current efforts and future reform, the commission would play an integral role in shaping the provision of indigent defense services in Idaho. By engaging in disinterested analysis, deliberation, leadership, and advocacy, a strategic planning commission could ultimately

[1] Tex. Govt. Code Ann. § 79.014(c).
[2] See Figure 12, Appendix, p. 59.
[3] See Figure 12, Appendix, p. 59.

effectuate substantial and meaningful changes in the quality of indigent defense services and in resource parity. Also, if a strategic planning commission ultimately institutes an enforcement mechanism, whether mandatory or compliance-based, the commission could simply transition into the role as the policymaking body that ultimately directs the efforts of an executive director.

The creation of a body that engages in research, analysis, advocacy, outreach, and fundraising would go a long way in promoting the independence, institutional memory, and empowerment of an indigent defense policy mechanism. Such a strategic planning commission would be an important first step toward comprehensive state-level oversight of the provision of public defense services.

Unlike the foregoing approaches to comprehensive indigent defense reform, a commission based on the tech-support model would not necessarily perform a regulatory function. Rather than seek to induce or compel counties to comply with standards or procedures, a tech-support commission would simply engage in the direct provision of in-kind services and support. The commission would primarily serve as a resource for attorneys providing indigent defense services.

In some states, as opposed to the commission directly providing services, other non-profit organizations provide support to public defense attorneys. In New York, the Public Defense Backup Center "provides technical assistance to indigent defense attorneys throughout the state in the form of legal research, publications, training, and consultation."[1] Also, the Washington Defender Association ("WDA") is an association of criminal defense attorneys, public defenders, social workers, investigators, and others "committed to improving indigent defense."[2] The WDA provides free live and online training, access to a listserv by practice area, case assistance, and legislative advocacy.[3] In particular, the WDA assists public defense attorneys with spotting issues that may benefit their clients at all stages of their cases, shaping arguments for pre-trial motions and evidentiary issues that may arise during trial, researching procedural issues, brainstorming trial and sentencing strategies, and providing sample motions, forms, and practice advisories.[4]

In other states, the commission or board acts in the tech-support capacity itself. In South Carolina, for example, the Office of Indigent Defense is charged with assisting public defenders throughout the state in their efforts

[1] American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice—A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings*, 36-37 (ABA 2004); *see* New York State Defenders Association, *Public Defense Backup Center*, http://www.nysda.org. *Note*: the State of New York recently instituted the Office of Indigent Legal Services. *See* 2010 N.Y. Laws, Chapter 56. The purpose of the Office is to monitor, study, and make efforts to improve the quality of indigent defense services provided.

[2] Washington Defender Association, *Welcome to WDA*, http://www.defensenet.org.

[3] *Id*.

[4] *Id*.

to provide "adequate legal defense to the indigent."[1] Some of the "assistance" provided includes the preparation and distribution of basic defense manuals and other educational materials, the preparation and distribution of model forms and documents employed in indigent defense, the promotion of and assistance in the training of indigent defense attorneys, the provision of legal research assistance to public defenders, and the provision of "other" assistance to public defenders "as may be authorized by law."[2] Similarly, in Kansas, the State Board of Indigents' Defense Services is authorized to conduct programs having the general objective of "training and educating attorneys and other persons who are involved in the legal representation of indigent persons."[3] The board is also authorized to provide technical aid and assistance to counsel providing legal representation to indigent persons.[4]

In Idaho, a tech-support commission could be created to serve in the limited capacity of providing in-kind services and support. Such services and support could include the creation and maintenance of a database containing case law and other research, model forms, and sample briefs. The commission could also create and maintain a listserv specifically for attorneys providing public defense services so that they may interact in their brainstorming and strategizing. The commission could provide or facilitate training opportunities, particularly for juvenile, child protection, and mental health issues. Further, a tech-support commission could even consider staffing an attorney to provide assistance in specialized areas such as child protection or mental health commitment cases. The WDA, for instance, established a full-time immigration attorney position to advise attorneys on immigration issues affecting non-citizen clients.[5]

The primary advantage of the tech-support model is that counties and public defenders benefit from the availability of services and support while not being burdened with additional compliance concerns. Particularly in rural Idaho counties, public defenders would benefit from the availability of advice and support whenever they encounter unexpected or novel legal issues. Such an approach to indigent defense reform would be more politically palatable as counties, again, receive benefits without additional burdens and maintain local control over the provision of indigent defense. A tech-support model, in other words, is ideologically consistent with the current system.

The obvious disadvantage to an approach that focuses on the mere provision of services and support is that there is no apparent attempt to obtain uniformity and no real incentive for improvement. Though supplementing the resources already available to attorneys providing public defense services would certainly behoove them in their efforts, it could potentially promote complacency, dependence, and a sense of entitlement without any real promise of meaningful changes in the current system. After all, a lack of oversight

[1] S.C. Code Ann. § 17-3-310(g)(4).
[2] *Id.*
[3] Kan. Stat. Ann. § 22-4523(c).
[4] Kan. Stat. Ann. § 22-4523(d).
[5] Washington Defender Association, *Immigration Project*, http://www. defensenet.org.

contributes to a "hodgepodge" of public defense programs with varying levels of effectiveness.[1]

Another alternative to the various approaches to indigent defense provision is to adopt certain elements of each model. "Efforts to reform indigent defense systems have been most successful when they involve multi-faceted approaches."[2] To this end, authority could be delegated to a commission to promulgate and/or enforce certain mandatory components and also to offer certain benefits as an incentive to comply with other optional ones. At the same time, the commission could also be serving in a strategic planning and tech-support capacity in some regard. In other words, a commission could be created by piecing together the best, and/or most feasible, components of the various approaches.

Without question, the ability to accurately collect and analyze data is of the most fundamental and important roles an indigent defense commission can play. Because access to accurate data would be foundational to any meaningful empirical analysis of indigent defense provision in Idaho, minimum data reporting requirements should be a mandatory component of a mixed commission model. Whether (a) reporting requirements are provided by statute and the commission is granted authority to enforce them or (b) the commission is delegated authority to promulgate data requirements by administrative rule along with the corresponding authority to enforce such rules, some level of minimum reporting on the part of *all* attorneys providing indigent defense services should be mandatory. Also, the commission should be granted authority—by mandamus or otherwise—to enforce the data reporting requirements so that they are, indeed, mandatory.

As to possible incentivized elements of a mixed commission model, access to tech-support services could be made conditional upon compliance with minimum training requirements on juvenile, child protection, and mental health commitment issues as well as with mandatory data reporting requirements as discussed above. Conditional services and support could include, at first, simple access to a listserv, a brief and/or motion bank, research, and additional training opportunities. Though the commission's capacity in terms of support and services would likely be limited at first, the commission could gradually add to its "pot" of conditional benefits and, in turn, gradually demand more from the counties in exchange for those benefits. With effort and good fortune, perhaps, the commission could one day offer enough of an incentive to counties to make it worth their while to comply with caseload, workload, or other performance standards.

Meanwhile, the commission could be active in its capacity as a strategic planning body. First, the commission could engage in the collection and analysis of data reported by counties pursuant to mandatory reporting

[1] Justice Policy Institute, *System Overload: The Costs of Under-Resourcing Public Defense*, 16 (2011).

[2] American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice—A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings*, 40 (ABA 2004).

requirements. Second, with these data and analyses available, the commission could determine its priorities, evaluate the various ways to go about achieving its goals, and then implement its plan. Third, the commission could serve in an advocacy and educational role by seeking partnerships and building consensus among various stakeholders as well as by reporting and making recommendations to the legislature. Fourth, and perhaps most importantly, the commission could seek revenue to fund its efforts and to provide incentives to the counties.

According to traditional academic wisdom, collective choice exercised through governmental structures which fails to promote social values in desired and/or predictable ways constitutes a so-called "government failure."[1] "Government failures" are generally addressed by government in one of the following five ways: market-based approaches such as deregulation or privatization; subsidization or alteration of incentives; rulemaking; direct or indirect provision of goods or services; or the provision of insurance or cushions.[2] The mixed model commission would wield several of these approaches and would effectuate a multifaceted means of correcting the "government failure." By promulgating and/or enforcing data reporting requirements, the commission would resemble a mandatory compliance model and would be utilizing a rules-based approach to addressing the problem. Also, by providing services and support in exchange for compliance with minimum training requirements, the commission would be adopting elements of both a tech-support model and an incentivized compliance model and would be utilizing a service provision and subsidization approach to correcting the failures.

The statutory creation of a commission with certain minimal powers and duties in each of the foregoing areas would be a relatively conservative and incremental approach to comprehensive indigent defense reform in Idaho. Also, a mixed model commission could be a pareto-efficient means of addressing the problems with Idaho's indigent defense system, in that the public interest in being availed of the Sixth Amendment would be significantly better off while, at the same time, the counties and coffers would not be worse off.

When evaluating multiple policy alternatives, one option to always consider is simply maintaining the status quo.[3] When considering if to act, when to act, and how to act, bearing in mind the costs and benefits of *not* acting is a necessary exercise. In the case of indigent defense reform, the benefits of maintaining the status quo are realized, arguably, by lawmakers, counties, and public defenders. Lawmakers would not have to risk political backfire from the possible allocation of scarce funds, counties would maintain their dominion of the provision of public defense delivery systems, and public defenders would not have to accommodate additional "red tape."

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[1] *See generally* David Weimer & Aidan R. Vining, *Policy Analysis: Concepts and Practices* (4th ed., Pearson 2005).
[2] *Id.*
[3] *Id.*

Aside from the potential costs borne by indigent defendants and by the criminal justice system in general, maintaining the status quo poses a significant threat to the state in the form of litigation, particularly if counties choose to utilize fixed-fee contracts for the provision of indigent defense services. Indeed, the landscape of indigent defense reform has been shaped, in significant part, by litigation. Early litigation focused on claims of ineffective assistance of counsel and conflicts of interest that arise from utilization of fee caps or fixed-fee contracts for indigent defense services.[1]

> In contract systems, the concern focuses primarily on flat-fee contracts which pay a single lump sum for a block of cases, regardless of how much work the attorney does. This creates a direct financial conflict of interest between the attorney and the client, in the sense that work or services beyond the bare minimum effectively reduce the attorneys' take-home compensation. Attorneys learn the filing of motions increases the life of cases, reduces the attorney's profit, and incurs the judge's displeasure—which in turn may lead to out-right termination of a contract. Without regard to the necessary parameters of ethical representation, the attorney's caseload creeps higher and higher, yet the attorney is in no position to refuse the dictates of the judge.[2]

Though many cases were dismissed, "not all state court judges have been hostile to these types of claims."[3]

For example, in *State v. Smith*, the Arizona Supreme Court held that the county's bid system violated prevailing professional standards because it did not account for the time attorneys are expected to spend on cases, support costs, attorney competency, or case complexity.[4] There, a bid letter was sent from the presiding judge to all attorneys in the county. The letter called for sealed bids for the provision of indigent defense and no limitations were placed on caseloads or hours, nor were there any criteria for evaluating ability or experience of potential applicants. Successful bidders were assigned all adult and juvenile indigent criminal cases and all mental evaluations. What is more, all investigators, paralegals, and secretaries had to be provided by the individual bidder who also had to provide his or her own office space, equipment, and supplies. The court noted that:

[1] Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U Rev. L. & Soc. Change 427, 437 (2009).
[2] American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice—A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings*, 8 (ABA 2004).
[3] *Id*.
[4] 681 P.2d 1374 (Ariz. 1984).

> if [this] same procedure for selection and compensation of counsel is followed . . . there will be an inference that the procedure resulted in ineffective assistance of counsel, which inference the state will have the burden of rebutting.[1]

Similarly, the Iowa Supreme Court reviewed the constitutionality of a hard cap that prevented an attorney from recovering additional fees even in a case where effort in excess of that authorized was reasonable and necessary.[2] The court held that if the state imposes a "hard-and-fast" fee cap in all cases, it would "substantially undermine the right of indigents to effective assistance of counsel in criminal proceedings."[3] Ultimately, the court construed the fee cap statute not to prohibit exceptional fees so as to avoid the constitutional issue.[4]

In addition to these lawsuits that arose from individual criminal cases, indigent defense advocates have pursued indigent defense reform through systemic lawsuits. "These suits are primarily state-court class actions, challenging objective criteria, such as excessive attorney caseloads, meager rates of attorney compensation, a lack of attorney hiring and training criteria, and *the absence of an oversight mechanism*."[5] The case that has paved the way for subsequent litigation in Montana, Massachusetts, Washington, Michigan, and New York is *Rivera v. Rowland*.[6] In that case, the ACLU and the Connecticut Civil Liberties Union sued the governor on the basis that the failure to adequately fund the state's indigent defense system was a violation of the Sixth and Fourteenth Amendments. "Specifically, the suit challenged excessive attorney caseloads, substandard rates of compensation for attorneys, and a lack of adequate representation for juvenile defendants."[7] Ultimately, the parties reached an agreement, albeit after four years of litigation, which resulted in a raw increase in the number of public defenders, a corresponding reduction in caseloads, practice guidelines, and the implementation of an oversight system.[8]

Similar litigation prompted an overhaul of Montana's indigent defense system where, in 2005, the duty to provide indigent defense funding and oversight was shifted from the counties to the state.[9] "Momentum to pass the legislation came from a lawsuit filed by the ACLU alleging that the state's indigent defense system was denying indigent defendants their right to effective assistance of counsel."[10] Specifically, the plaintiffs argued that the

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[1] *Id*.
[2] *Simmons v. State Public Defender*, 791 N.W.2d 69 (Iowa 2010).
[3] *Id*. at 87.
[4] *Id*.
[5] Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U Rev. L. & Soc. Change 427, 444 (2009).
[6] 1998 WL 96407 (Conn. Super. Ct. Feb. 20, 1998).
[7] Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U Rev. L. & Soc. Change 427, 445 (2009).
[8] *Id*.
[9] *White v. Martz*, No. C DV-2002-133 (Mont. Jud. Dist. Ct. Apr. 1, 2002).
[10] The Spangenberg Group, *State Indigent Defense Commissions*, 13-14 (ABA 2006).

state's delegation of authority over indigent defense provision to the counties resulted in "grossly inadequate representation."[1] The ACLU withdrew its claims once "the state indicated its intent to resolve the situation through legislation rather than a court order."[2]

In Washington, three indigent defendants with cases pending in the Washington Superior Court of Grant County filed a class action lawsuit seeking declaratory and injunctive relief. The complaint alleged that Grant County failed to establish a system that provided effective assistance of counsel to indigent persons, assure that all public defenders met professional qualifications, monitor or oversee the public defense system, provide adequate funds to pay necessary costs of defense, and provide representation at all critical stages. The court granted the plaintiffs' motion to certify the case as a class action and eventually issued a favorable pretrial ruling for the plaintiffs. The parties settled the case soon thereafter and entered into a six-year agreement which called for Grant County to, among other things, abide by caseload and qualification standards, provide adequate funding for investigators and expert witnesses, and comply with other public defender standards endorsed by the state bar and authorized by the legislature. The settlement also provided for a court-appointed monitor to oversee and direct compliance with the agreement.[3]

Again, this litigation has helped shape a new model for structural litigation of indigent defense. "The model is based on careful preparation and empirical evidence gathering, strategic procedural decision making from the outset, reference to existing professional standards, and reliance upon the support of powerful allies within a criminal justice system."[4] Of particular concern to states like Idaho and Utah is the fact that they have been specifically targeted as "jurisdictions that may be ripe for the third generation of indigent defense litigation."[5]

Idaho policymakers should be aware that litigation could be a likely reality for two noteworthy reasons. First, as discussed above, Idaho is in the minority of states that does not primarily fund indigent defense.

> Given that experts agree that a statewide system is preferable to a patchwork county-based system, those states with no state funding or with a majority of county-based funding may face lawsuits. These jurisdictions include Pennsylvania and Utah, where counties provide 100% of indigent defense funds, as well as states such as South Carolina, Texas, Idaho, and Nebraska, where counties provide more than 50% of defense monies.[6]

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[1] Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U Rev. L. & Soc. Change 427, 446 (2009).
[2] The Spangenberg Group, *State Indigent Defense Commissions*, 14 (ABA 2006).
[3] Settlement Agreement, *Best v. Grant County*, No. 04-2-00189-0 (2005).
[4] Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U Rev. L. & Soc. Change 427, 458 (2009).
[5] *Id*. at 462.
[6] *Id.*

Second, successful suits were brought in jurisdictions where "other efforts had already been made to improve the public defense system and litigation truly was a last resort."[1] "It is much easier for plaintiffs to convince a state court judge to take jurisdiction over a systemic Sixth Amendment suit when other, non-litigation strategies have already been pursued."[2] For example, in Montana the complaint specifically averred that the state had awareness of and indifference to the indigent defense crisis, as evidenced by the fact that there had previously been two statewide studies of indigent defense, both of which found that the mandates of *Gideon* were not being met.[3] Like Montana, Idaho was recently the subject of a statewide study on indigent defense provision.[4] If policymakers are unable or unwilling to address systematic concerns with Idaho's indigent defense system, litigation could be considered as a last resort. "Faced with the reality that the legislature has been on notice for years and has failed to act, a state court judge is more likely to take action."[5]

Particularly because Idaho has been identified as a jurisdiction that is ripe for litigation, the significant risk of a lawsuit must be borne in mind as a very likely cost of choosing the status quo as a policy alternative. "As litigation becomes an increasingly refined and more successful tool, it may become the preferred alternative to a prolonged legislative campaign."[6] While drastically shifting the responsibility of administering and funding indigent defense from the counties to the state is a political unlikelihood, other hybrid measures are a possibility. Indeed, Idaho is not without guidance. As discussed above in detail, states like Indiana, Nebraska, Ohio, and Texas have instituted statewide oversight of predominantly county-funded and locally-administered indigent defense programs.

In light of the aforementioned approaches to indigent defense reform, the Subcommittee has concluded that authority should be statutorily delegated to an independent commission to promulgate and enforce certain standards for public defense attorneys, including statewide training and continuing legal education requirements, data reporting requirements, core provisions for contracts between counties and private providers of public defense services, qualification standards, and caseload and workload controls.[7]

The Subcommittee has agreed on the substance and form of the legislation creating such a commission and providing for its duties. However, instead of pursuing the introduction of the proposed bill during the 2013 legislative session, the decision was reached to recommend that an interim

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[1] *Id.* at 449.
[2] *Id*.
[3] *Id*.
[4] *The Guarantee of Counsel: Advocacy and Due Process in Idaho's Trial Courts,* National Legal Aid & Defender Association, 2010.
[5] Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U Rev. L. & Soc. Change 427, 450 (2009).
[6] *Id*. at 462.
[7] See proposed enabling statute, Appendix, pp. 12-14.

legislative committee be formed to examine the proposed commission model and corresponding legislation in addition to other potential means of reforming Idaho's public defense system.[1]

The Subcommittee has also suggested that if an interim committee is ultimately created it should explore potential ways to fund and implement public defense reform. Indeed, the prospect of statewide standards, *e.g.*, caseload limits, for indigent defense attorneys may raise concerns about the already-limited resources available to counties for such use. If public defenders are required to keep their caseload numbers under certain thresholds, for example, counties may be required to hire additional public defenders to account for cases in excess of the limits imposed by the standards.

Yet, advocates of such standards respond by suggesting that one way policymakers may account for limited caseload capacities is to correspondingly reduce the number of cases for which counsel must be appointed.

> Changing prosecution charging practices, creating new criminal justice processes to divert cases out of the formal criminal justice system, and reclassifying certain crimes down to civil infractions are all perfectly acceptable ways to decrease the number of cases needing publicly paid representation, without the state or counties spending one dime more for public defense.[2]

Indeed, some suggest that the problem of excessive caseloads is not the effect of rising crime rates, but rather the consequence of "criminal justice policies emphasizing law and order and getting tough on crime."[3]

In consideration of these "demand-side" solutions to solving resource problems, some advocate for the reclassification of less-serious and, in some cases, antiquated criminal offenses. "Across the country behaviors such as not wearing a seatbelt, walking a dog without a leash, feeding homeless people, riding a bicycle on a sidewalk, or occupying more than one seat on a subway car are criminalized and punishable with jail time."[4] Because these offenses carry the possibility of a jail sentence, as discussed in detail above, the Sixth Amendment right to counsel is implicated. "The modification of minor misdemeanor offenses into infractions or non-jailable offenses has the potential to save states money that otherwise would be spent on litigation or expensive incarceration."[5]

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[1] See proposed concurrent resolution, Appendix, pp. 23-25.
[2] David Carroll, *Gideon Alert: Proposed Washington Supreme Court Standards Give Focus to National Caseload Debate*, National Legal Aid & Defender Association, November 8, 2011.
[3] Justice Policy Institute, *System Overload: The Costs of Under-Resourcing Public Defense*, 14 (Justice Policy Institute 2011).
[4] *Id.*
[5] The Spangenberg Project, *An Update on State Efforts in Misdemeanor Reclassification, Penalty Reduction and Alternative Sentencing*, i (Bar Information Program at the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants, 2010).

Recently, there has been "significant movement" nationwide toward reclassification of misdemeanor offenses to infractions and of "jailable" misdemeanors to non-jailable ones.[1] For example, Alaska has amended its misdemeanor statute for minors in possession of alcohol so that it would be charged as a violation for which the person cannot be detained.[2] Massachusetts has given discretion to its district attorneys so that they may charge certain misdemeanors as civil infractions, *e.g.*, disorderly persons, disturbing the peace, shoplifting, illegal possession of Class "C" marijuana, prostitution, larceny by check, trespass on land, and operating an uninsured motor vehicle.[3] In New Hampshire, the legislature created two classes of offenses for misdemeanors: Class "A" for which imprisonment is authorized and Class "B," for which no imprisonment is authorized.

In response to efforts to reclassify offenses, states have seen "varying levels of success."[4]

> The largest cost savings for states occurs when a misdemeanor is reclassified into a non-jailable infraction or citation. Such reclassification eliminates the requirement of appointment of counsel and often decreases the collateral consequences that are attached to a guilty plea in these cases.[5]

In 2011, North Carolina conducted a study that sought to identify the potential cost savings attributable to reclassification. Ultimately, the study concluded that the indigent defense system would save approximately $2.25 million in attorney fees alone if all of the identified offenses were reclassified as infractions.[6]

> The data shows that the North Carolina court system is handling a high volume of low level misdemeanor cases and suggests that the North Carolina court system could save significant money and relieve over-burdened courts by reclassifying many minor misdemeanor offenses as infractions. In addition, the fact that approximately 1.03 million individuals or 11% of North Carolina's population had criminal matters before a court in FY09 suggests that North Carolina may be treating too much as criminal.[7]

While some scholars find that reclassification would be an effective way to relieve an over-burdened criminal justice system, others have criticized

[1] *Id.*
[2] *Id* at 4.
[3] *Id*.
[4] *Id.*
[5] *Id*.
[6] North Carolina Office of Indigent Defense Services, FY11 Reclassification Impact Study, 7 (Office of Indigent Defense Services, 2011).
[7] *Id*. at 8.

the "chilling effect" such a practice may have on Sixth Amendment rights. Because there would be no possibility of a jail sentence associated with the reclassified offense, the Sixth Amendment right to counsel would never be triggered. Yet, a defendant may still face the collateral consequences of a conviction. Particularly when the reclassified offense is still considered a misdemeanor, defendants' immigration status, public housing, public benefits, college financial aid, child custody, employment, or drivers' licenses may remain in jeopardy.

> Without removing these kinds of behaviors from the justice system all together, simply reclassifying them could result in denying people who cannot afford to hire an attorney the critical assistance of an attorney.[1]

In Idaho, any discussion as to whether or not any misdemeanor offenses should be reclassified would likely begin with an analysis of Idaho's most common offenses. As illustrated in Figure 10, the most common offenses in 2010 varied from 7,779 (Proof of Liability Insurance) to 240 (Pedestrian Under the Influence).[2] In the middle were offenses like Possession of Paraphernalia (POP) (5,520) and Minor in Possession of Alcohol (MIP) (1,755). While the Subcommittee never voted on the topic of reclassifying any of these offenses, members have had cursory discussions.[3] Some members suggested that because jail time was so rarely sought for the first violation of offenses like POPs and MIPs, reclassification could be explored for those misdemeanors. However, others members expressed that judicial discretion on a case-by-case basis was important given the differences between individual cases.

Ultimately, whether or not certain misdemeanors are reclassified as non-jailable misdemeanors or as infractions in Idaho is a policy decision. In determining a comprehensive and sustainable approach to indigent defense reform, Idaho lawmakers could consider the cost-saving efforts of other states in "cleaning up" or reorganizing their criminal statutes. In making this decision, lawmakers should also bear in mind that a violation of many city ordinances triggers the obligation of the counties to provide indigent defense services, as those ordinances are punishable by imprisonment. Thus, not only are the counties bearing the cost of providing counsel for violation of arguably non-serious state statutes, but also for violation of arguably non-serious city ordinances.[4] Indeed, in an effort to supplement indigent defense funding, some states impose surcharges on localities for providing indigent defense services

[1] Justice Policy Institute, *System Overload: The Costs of Under-Resourcing Public Defense*, 16 (Justice Policy Institute 2011).
[2] See Appendix, p. 57.
[3] See Subcommittee Meeting Minutes, November 30, 2011, p. 5.
[4] *See*, *e.g.*, § 6-01-21, Boise City Code ("Unless otherwise specified, a violation of this Chapter is a misdemeanor, punishable by a fine not exceeding one thousand dollars ($1,000) and imprisonment in the county jail not to exceed six (6) months").

for violation their ordinances. For instance, in North Dakota and Ohio, the indigent defense commissions are authorized to contract with and charge localities for providing indigent defense services to individuals charged with violation of local ordinances.[1] Idaho counties, like in North Dakota and Ohio, could charge cities for the cost of providing counsel to those charged with violation of city ordinances. This would create a new revenue source to help fund indigent defense.

[1] N.D. Cent. Code § 54-61-02; Ohio Rev. Code Ann. § 120.14.

STATEMENT OF PURPOSE (Draft 01-24-2013)

RS _____

The purpose of the legislation is to update Chapter 8, Title 19, Idaho Code, to achieve uniformity in the provision of counsel at public expense as well as technical consistency.

The amendments replace the phrase, "needy person," with the phrase, "indigent person," and remove statutory cross-references to code sections that have been repealed.

The legislation also revises the definition of the term, "serious crime," to include any offense the penalty for which includes the mere possibility of confinement, incarceration, imprisonment, or detention in a correctional facility. This ensures the consistent and uniform appointment of counsel throughout Idaho in conformance with the demands of the Sixth Amendment by clarifying the offenses for which counsel shall be appointed. The legislation also achieves consistency and uniformity in terms of financial eligibility for appointment of counsel by providing a uniform standard of eligibility.

The amendments also seek to avoid the discouragement of assertion of Fifth and Sixth Amendment rights. First, they restrict the use of information provided by a person to establish eligibility for counsel, thereby guarding the Fifth Amendment privilege against self-incrimination. Second, they limit the recovery of the costs of counsel to those associated with actual conviction and prohibit recovery if doing so imposes a manifest hardship on the defendant.

The bill also expands the indigent defense data reporting requirements to all attorneys (*e.g.*, contractors and appointed counsel) that provide representation at public expense, as opposed to just county public defender offices, by defining the term, "defending attorney."

FISCAL NOTE

The proposed legislation would have no impact on the state general fund. The impact on counties cannot be precisely calculated. Because the current statute does not provide for a uniform standard of financial eligibility for appointment of counsel, the net impact on the number of appointments cannot be predicted.

LEGISLATURE OF THE STATE OF IDAHO

Sixty-second Legislature First Regular Session - 2013

IN THE SENATE

SENATE BILL NO.

BY JUDICIARY AND RULES COMMITTEE

AN ACT

RELATING TO THE RIGHT TO REPRESENTATION BY COUNSEL; AMENDING SECTIONS 19-851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 863, 864, AND 865, IDAHO CODE, TO SUBSTITUTE THE PHRASE, "NEEDY PERSON," WITH THE PHRASE, "INDIGENT PERSON;" AMENDING SECTION 19-851, IDAHO CODE, TO REVISE THE DEFINITION OF "SERIOUS CRIME" TO INCLUDE ANY OFFENSE THE PENALTY FOR WHICH INCLUDES THE POSSIBILITY OF CONFINEMENT AND TO DEFINE THE TERM, "DEFENDING ATTORNEY;" AMENDING SECTION 19-854, IDAHO CODE, TO PROVIDE FOR PRESUMPTIVE AND DISCRETIONARY INDIGENCY, TO LIMIT USE OF INFORMATION PROVIDED ON WRITTEN APPLICATIONS FOR APPOINTMENT OF COUNSEL, AND TO PROHIBIT ANY REIMBURSEMENT OBLIGATION FROM BEING IMPOSED UNTIL AFTER CONVICTION; AND AMENDING SECTION 19-864, IDAHO CODE, TO REVISE THE REPORTING REQUIREMENTS OF ATTORNEYS PROVIDING INDIGENT DEFENSE SERVICES.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 19-851, Idaho Code, be, and the same is hereby amended to read as follows:

19-851. RIGHT TO REPRESENTATION BY COUNSEL -- DEFINITIONS. In this act, the term:

(a) "Defending attorney" means any attorney employed by the office of public defender, contracted by the county, or otherwise assigned to represent adults or juveniles at public expense;

(b) "Detain" means to have in custody or otherwise deprive of freedom of action;

~~(b)~~(c) "Expenses," when used with reference to representation under this act, includes the expenses of investigation, other preparation, and trial;

~~(c)~~(d) "~~Needy person~~ Indigent person" means a person who, at the time his need is determined pursuant to section 19-854, Idaho Code, is unable to provide for the full payment of an attorney and all other necessary expenses of representation;

~~(d)~~(e) "Serious crime" ~~includes:~~ means any offense the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correctional facility regardless of whether actually imposed.

~~(1) a felony;~~

~~(2) any misdemeanor or offense the penalty for which, excluding imprisonment for nonpayment of a fine, includes the possibility of confinement.~~

SECTION 2. That Section 19-852, Idaho Code, be, and the same is hereby amended to read as follows:

19-852. RIGHT TO COUNSEL OF ~~NEEDY PERSON~~ INDIGENT PERSON -- REPRESENTATION AT ALL STAGES OF CRIMINAL AND COMMITMENT PROCEEDINGS -- PAYMENT. (a) An ~~needy person~~ indigent person who is being detained by a law enforcement officer, who is confined or is the subject of hospitalization proceedings pursuant to sections 18-212, ~~18-214,~~ 66-322, 66-326, 66-329, 66-404 or ~~66-409~~ 66-406, Idaho Code, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled:

(1) to be represented by an attorney to the same extent as a person having his own counsel is so entitled; and

(2) to be provided with the necessary services and facilities of representation (including investigation and other preparation). The attorney, services, and facilities and the court costs shall be provided at public expense to the extent that the person is, at the time the court determines need pursuant to 19-854, Idaho Code, unable to provide for their payment.

(b) An ~~needy person~~ indigent person who is entitled to be represented by an attorney under subsection (a) is entitled:

(1) to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation;

(2) to be represented in any appeal;

(3) to be represented in any other post-conviction or post-commitment proceeding that the attorney or the ~~needy person~~ indigent person considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.

(c) An ~~needy person's~~ indigent person's right to a benefit under subsection (a) or (b) is unaffected by his having provided

a similar benefit at his own expense, or by his having waived it, at an earlier stage.

SECTION 3. That Section 19-853, Idaho Code, be, and the same is hereby amended to read as follows:

19-853. DUTY TO NOTIFY ACCUSED OR DETAINED OF RIGHT TO COUNSEL -- APPOINTMENT OF COUNSEL. (a) If a person who is being detained by a law enforcement officer, or who is confined or who is the subject of hospitalization proceedings pursuant to sections 66-322, 66-326, 66-329, 66-404 or ~~66-409~~ 66-406, Idaho Code, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned, upon commencement of detention, or the court, upon formal charge or hearing, as the case may be, shall:

(1) clearly inform him of his right to counsel and of the right of an ~~needy person~~ indigent person to be represented by an attorney at public expense; and

(2) if the person detained or charged does not have an attorney, notify the ~~public defender~~ defending attorney or trial court concerned, as the case may be, that he is not so represented. As used in this subsection, the term "commencement of detention" includes the taking into custody of a probationer.

(b) Upon commencement of any later judicial proceeding relating to the same matter, including, but not limited to, preliminary hearing, arraignment, trial, any post-conviction proceeding, or post-commitment proceeding, the presiding officer shall clearly inform the person so detained or charged of his right to counsel and of the right of an ~~needy person~~ indigent person to be represented by an attorney at public expense. Provided, the appointment of an attorney at public expense in uniform post-conviction procedure act proceedings shall be in accordance with section 19-4904, Idaho Code.

(c) If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the ~~public defender~~ defending attorney or assign an attorney, as the case may be.

(d) Upon notification by the court or assignment under this section, the ~~public defender~~ defending attorney ~~or assigned attorney, as the case may be,~~ shall represent the person with respect to whom the notification or assignment is made.

SECTION 4. That Section 19-854, Idaho Code, be, and the same is hereby amended to read as follows:

19-854. DETERMINATION OF ~~NEED~~ INDIGENCY -- FACTORS CONSIDERED -- PARTIAL PAYMENT BY ACCUSED -- REIMBURSEMENT. (a) The determination of whether a person covered by section 19-852, Idaho Code, is an ~~needy person~~ indigent person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under section 19-858, Idaho Code, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each proceeding, whether he is an ~~needy person~~ indigent person.

(b) The court concerned shall presume that the following persons are indigent persons unless such a determination is contrary to the interests of justice:

(1) Persons whose current monthly income does not exceed one hundred eighty-seven percent (187%) of the federal poverty guidelines issued annually by the federal department of health and human services;

(2) Persons who receive, or whose dependents receive, pursuant to title 56, Idaho Code, public assistance in the form of food assistance, health coverage, cash assistance, or childcare assistance; or

(3) Persons who are currently serving a sentence in a correctional facility or are being housed in a mental health facility.

(c) The court concerned may determine that persons other than those under subsection (b) above are indigent persons. In determining whether a person is an ~~needy person~~ indigent person and in determining the extent of his inability to pay, the court concerned may consider such factors as income, property owned, outstanding obligations, ~~and~~ the number and ages of his dependents, and the cost of bail.

(d) Release on bail does not necessarily prevent ~~him~~ a person from being an ~~needy person~~ indigent person.

(e) In each case, the person shall, subject to the penalties for perjury, certify in writing or by other record such material factors relating to his ability to pay as the court prescribes by rule. No information provided by a person pursuant to this subsection may be used as substantive evidence in any criminal or civil proceeding against the person except:

(1) for impeachment purposes;

(2) in a prosecution for perjury or contempt committed in providing the information; or

(3) in an attempt to enforce an obligation to reimburse the state for the cost of counsel.

~~(c)~~(f) To the extent that a person covered by section 19-852, Idaho Code, is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court may order him to provide for their payment.

~~(d)~~(g) Upon conviction, notwithstanding the form of judgment or withheld judgment, plea of guilty, or finding of guilt for any crime regardless of the original crime or number of counts, an ~~needy person~~ indigent person who receives the services of an attorney provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those services related to the conviction, plea of guilty, or finding of guilt, unless the requirement would impose a manifest hardship on the indigent person. The ~~immediate~~ current inability of the ~~needy person~~ indigent person to pay the reimbursement shall not, in and of itself, restrict the court from ordering reimbursement.

SECTION 5. That Section 19-855, Idaho Code, be, and the same is hereby amended to read as follows:

19-855. QUALIFICATIONS OF COUNSEL. No person may be given the primary responsibility of representing an ~~needy person~~ indigent person unless he is licensed to practice law in this state and is otherwise competent to counsel and defend a person charged with a crime.

SECTION 6. That Section 19-856, Idaho Code, be, and the same is hereby repealed.

SECTION 7. That Section 19-857, Idaho Code, be, and the same is hereby amended to read as follows:

19-857. WAIVER OF COUNSEL -- CONSIDERATION BY COURT. A person who has been appropriately informed of his right to counsel may waive ~~in writing, or by other record,~~ any right provided by this act, if the court concerned, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and familiarity with the English language and the complexity of the crime involved.

SECTION 8. That Section 19-858, Idaho Code, be, and the same is hereby amended to read as follows:

19-858. REIMBURSEMENT TO COUNTY -- WHEN AUTHORIZED. (a) The prosecuting attorney of each county may, on behalf of the county, recover payment or reimbursement, as the case may be, from each person who has received legal assistance or another benefit under this act:

(1) to which he was not entitled;

(2) with respect to which he was not an ~~needy person~~ indigent person when he received it; or

(3) with respect to which he has failed to make the certification required by section 19-854; and for which he refuses to pay or reimburse. Suit must be brought within five (5) years after the date on which the aid was received.

(b) The prosecuting attorney of each county may, on behalf of the county, recover payment or reimbursement, as the case may be, from each person other than a person covered by subsection (a) above, who has received legal assistance under this act and who, on the date on which suit is brought, is financially able to pay or reimburse the county for it without manifest hardship according to the standards of ability to pay applicable under sections 19-851, 19-852 and 19-854, but refuses to do so. Suit must be brought within three (3) ~~3~~ years after the date on which the benefit was received.

(c) Amounts recovered under this section shall be paid into the county general fund.

SECTION 9. That Section 19-859, Idaho Code, be, and the same is hereby amended to read as follows:

19-859. PUBLIC DEFENDER AUTHORIZED -- COURT APPOINTED ATTORNEYS -- JOINT COUNTY PUBLIC DEFENDERS. (a) The board of county commissioners of each county shall provide for the representation of ~~needy persons~~ indigent persons and other individuals who ~~with respect to serious crimes are subject to proceedings in the county or are detained in the county by law enforcement officers~~ are entitled to be represented by an attorney at public expense. They shall provide this representation by:

(1) establishing and maintaining an office of public defender;

(2) arranging with the courts ~~of criminal jurisdiction~~ in the county to assign attorneys on an equitable basis through a systematic, coordinated plan; or

(3) adopting a combination of these alternatives.

Until the board elects an alternative, it shall be considered as having elected alternative (a)(2).

(b) If it elects to establish and maintain an office of

public defender, the board of county commissioners of a county may join with the board of county commissioners of one (1) or more other counties to establish and maintain a joint office of public defender. In that case, the participating counties shall be treated for the purposes of this act as if they were one (1) county.

(c) If the board of county commissioners of a county elects to arrange with the courts ~~of criminal jurisdiction~~ in the county to assign attorneys, a court of the county may provide for advance assignment of attorneys, subject to later approval by it, to facilitate representation of matters arising before appearance in court.

SECTION 10. That Section 19-860, Idaho Code, be, and the same is hereby amended to read as follows:

19-860. PUBLIC DEFENDER -- TERM -- COMPENSATION -- APPOINTMENT -- QUALIFICATIONS -- COURT APPOINTED ATTORNEYS -- COMPENSATION. (a) If the board of county commissioners of a county elects to establish and maintain an office of public defender and/or juvenile public defender, the board shall:

(1) Prescribe the qualifications of such public defender, his term of office (which may not be less than two (2) years), and his rate of annual compensation, and, if so desired by the board, a rate of compensation for extraordinary services not recurring on a regular basis. So far as is possible, the compensation paid to such public defender shall not be less than the compensation paid to the county prosecutor for that portion of his practice devoted to criminal law.

(2) Provide for the establishment, maintenance and support of his office. The board of county commissioners shall appoint a public defender and/or juvenile public defender from a panel of not more than five (5) and not fewer than three (3) persons (if that many are available) designated by a committee of lawyers appointed by the administrative judge of the judicial district encompassing the county or his designee. To be a candidate, a person must be licensed to practice law in this state and must be competent to counsel and defend a person charged with a crime. During his incumbency, such public defender may engage in the practice of civil law and criminal law other than in the discharge of the duties of his office, unless he is prohibited from doing so by the board of county commissioners.

(b) If a court before whom a person appears upon a formal charge assigns an attorney other than a public defender to

represent an ~~needy person~~ indigent person, the appropriate district court, upon application, shall prescribe a reasonable rate of compensation for his services and shall determine the direct expenses necessary to representation for which he should be reimbursed. The county shall pay the attorney the amounts so prescribed. The attorney shall be compensated for his services with regard to the complexity of the issues, the time involved, and other relevant considerations.

SECTION 11. That Section 19-863, Idaho Code, be, and the same is hereby amended to read as follows:

19-863. DEFENSE EXPENSES -- ALLOCATION IN JOINTLY ESTABLISHED OFFICES. (a) Subject to section 19-861, any direct expense, including the cost of a transcript that is necessarily incurred in representing an ~~needy person~~ indigent person under this act, is a county charge against the county on behalf of which the service is performed.

(b) If ~~2~~ two (2) or more counties jointly establish an office of public defender, the expenses not otherwise allocable among the participating counties under subsection (a) shall be allocated, unless the counties otherwise agree, on the basis of population according to the most recent decennial census.

SECTION 12. That Section 19-864, Idaho Code, be, and the same is hereby amended to read as follows:

19-864. RECORDS OF ~~DEFENSE ATTORNEY~~ DEFENDING ATTORNEYS -- ANNUAL REPORT OF ~~PUBLIC DEFENDER'S OFFICE~~ DEFENDING ATTORNEYS. (a) A defending attorney shall keep appropriate records respecting each ~~needy person~~ person whom he represents under this act.

(b) ~~The public defender in those counties electing to establish and maintain such an office,~~ Defending attorneys shall submit an annual report to the board of county commissioners and the appropriate administrative district judge showing the number of persons represented under this act, the crimes involved, ~~the outcome of each case~~ and the expenditures (totalled by kind) made in carrying out the responsibilities imposed by this act. ~~A copy of the report shall also be submitted to each court having criminal jurisdiction in the counties that the program serves.~~

SECTION 13. That Section 19-865, Idaho Code, be, and the same is hereby amended to read as follows:

19-865. APPLICATION OF ACT -- STATE COURTS -- FEDERAL COURTS. This act applies only to representation in the courts of this state, except that it does not prohibit a ~~public defender~~ defending attorney from representing an ~~needy person~~ indigent person in a federal court of the United States, if:

(a) The matter arises out of or is related to an action pending or recently pending in a court of criminal jurisdiction of the state; or

(b) Representation is under a plan of the United States District Court as required by the Criminal Justice Act of 1964 (18 U.S.C. 3006A) and is approved by the board of county commissioners.

STATEMENT OF PURPOSE (Draft 01-24-2013)

RS _____

The purpose of the legislation is to promote the competent, consistent, and politically-insulated provision of trial-level public defense services by the creation of the Public Defense Commission. The Commission would be composed of members appointed by the three branches of government while accounting for membership of the minority political party. The Commission would promulgate standards regarding statewide qualifications, training, and performance of attorneys providing indigent defense services; data reporting; contracts between counties and private attorneys; and caseloads and workloads.

FISCAL NOTE

It is estimated that the general fund would be negatively impacted by the on-going operating costs of the Commission to the extent those costs are not offset by any additional revenue (*e.g.*, user fees, etc.). The estimated annual operating costs of the Commission are under $200,000. The impact on counties cannot be precisely calculated. Currently there is no comprehensive data reporting requirements to establish baselines for caseloads or amounts expended by counties for indigent defense. Without a baseline, and without actual promulgation of the standards by the Commission, the net impact on training costs, caseloads, etc. for the counties cannot be predicted with certainty.

LEGISLATURE OF THE STATE OF IDAHO

Sixty-second Legislature First Regular Session - 2013

IN THE SENATE

SENATE BILL NO.

BY JUDICIARY AND RULES COMMITTEE

AN ACT

RELATING TO THE IDAHO PUBLIC DEFENSE COMMISSION; AMENDING CHAPTER 8, TITLE 19, IDAHO CODE, BY THE ADDITION OF NEW SECTIONS 19-876, 877, and 878, IDAHO CODE, TO CREATE THE PUBLIC DEFENSE COMMISSION AND TO PROVIDE FOR ITS COMPOSITION, POWERS, AND DUTIES.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 8, Title 19, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 19-876, Idaho Code, and to read as follows:

19-876. CREATION -- APPOINTMENT -- QUALIFICATIONS - TERM -- COMPENSATION. (a) The public defense commission is hereby created in the department of self-governing agencies.

(b) The commission shall consist of thirteen (13) members appointed by the governor as follows:

(1) Two (2) representatives from the Idaho Association of Counties;

(2) Four (4) representatives from the legislative branch, including:

(i) the chair of the senate Judiciary and Rules Committee, or the chair's designee;

(ii) the chair of the house Judiciary, Rules, and Administration Committee, or the chair's designee;

(iii) the ranking minority member of the senate Judiciary and Rules Committee, or that person's designee; and

(iv) the ranking minority member of the house Judiciary, Rules, and Administration Committee, or that person's designee;

(3) Two (2) representatives designated by the chief justice of the Supreme Court;

(4) Two (2) representatives from the Idaho State Bar who are practicing attorneys or members of the state bar, of which one (1) shall have had experience as a public

defender;
(5) One (1) representative from the University of Idaho College of Law;
(6) One (1) representative from the Juvenile Justice Commission; and
(7) One (1) representative with expertise, by education, experience, or training, in cultural diversity and behavioral health issues.
(c) Initial terms of members of the commission appointed shall be as follows:
(1) The representatives from the Idaho Association of counties, Idaho State Bar, Juvenile Justice Commission, and University of Idaho College of Law shall serve terms of two (2) years; and
(2) The representatives designated by the chief justice of the Supreme Court, representatives from the legislative branch, and the representative with expertise in cultural diversity and behavioral health issues shall serve terms of one (1) year.
(d) Subsequent terms of members of the commission shall be for two (2) years.
(e) No member of the commission, other than members from the legislative branch under subsection (b)(2) above, shall have been a prosecutor or employee of a law enforcement agency within the five (5) years prior to appointment.
(f) A vacancy on the commission shall be filled in the same manner as the original appointment in a timely manner.
(g) Members of the commission may not receive a salary for service on the commission but may be reimbursed for expenses while engaged in the discharge of official duties.
(h) The commission's chair shall be appointed by the governor for a term certain.

SECTION 2. That Chapter 8, Title 19, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 19-877, Idaho Code, and to read as follows:

19-877. POWERS AND DUTIES. (a) The public defense commission shall:
(1) Appoint and remove the commission's executive director who shall be an at-will, full-time state employee;
(2) Establish the qualifications, duties, and compensation of the commission's executive director and regularly evaluate the performance of the executive director;
(3) Appoint the commission's vice-chair;
(4) Consult with or train county commissioners about the

provision of, or contracting for, indigent defense services; and

(5) Promulgate rules in accordance with the provisions of chapter 52, title 67, Idaho Code, establishing the following:

(A) Mandatory statewide training, education, and continuing legal education requirements for attorneys providing indigent defense services to promote competency and consistency in case types such as criminal, juvenile, abuse and neglect, civil commitment, capital, and civil contempt;

(B) Mandatory data reporting requirements regarding caseload, workload, and expenditures, for annual reports submitted pursuant to section 19-864, Idaho Code;

(C) A uniform definition of “case” to be utilized with annual data reporting requirements under subsection (5)(B);

(D) Core requirements for contracts between counties and private attorneys for provision of indigent defense services as well as model contracts for counties to utilize;

(E) Qualifications, experience, and performance standards for attorneys providing indigent defense services; and

(F) Caseload and workload standards as well as monitoring protocols.

SECTION 3. That Chapter 8, Title 19, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 19-878, Idaho Code, and to read as follows:

19-878. SHORT TITLE. Sections 19-876 through 19-878, Idaho Code, shall be known as the "Idaho Public Defense Act."

STATEMENT OF PURPOSE (Draft 01-24-2013)

RS _____

The purpose of the legislation is to clarify the circumstances in which juveniles are appointed counsel at public expense and to limit the circumstances in which juveniles may waive their right to counsel. The right to counsel would attach for a juvenile in any instance he is detained by a law enforcement officer or is under formal charge of having committed, or has been adjudicated for commission of, an act, omission, or status which brings him under the purview of the Juvenile Corrections Act. Juveniles would only be allowed to waive their right to counsel if they are charged with certain, non-serious offenses.

The legislation would also limit the use of information provided by a juvenile in pre-adjudication diversion proceedings so as to balance the Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel of the juvenile with the government's interest in facilitating informal disposition of juvenile proceedings.

FISCAL NOTE

The proposed legislation would have no impact on the state general fund. The impact on counties cannot be precisely calculated. Because the current statute does not provide uniform standards for waiver, the net impact on the number of waivers allowed cannot be predicted.

LEGISLATURE OF THE STATE OF IDAHO

Sixty-second Legislature First Regular Session - 2013

IN THE SENATE

SENATE BILL NO.

BY JUDICIARY AND RULES COMMITTEE

AN ACT

RELATING TO THE ADMISSIBILITY OF STATEMENTS MADE BY JUVENILES IN PRE-PETITION DIVERSION PROCEEDINGS AND TO THE RIGHT TO REPRESENTATION BY COUNSEL; AMENDING SECTION 20-511, IDAHO CODE, TO PROHIBIT THE ADMISSION OF STATEMENTS MADE BY JUVENILES DURING PRE-PETITION DIVERSION PROCEEDINGS IN SUBSEQUENT FACT-FINDING PROCEEDINGS; AND AMENDING SECTION 20-514, IDAHO CODE, TO PROVIDE FOR THE REPRESENTATION OF JUVENILES AT ALL STAGES OF PROCEEDINGS UNDER THE JUVENILE CORRECTIONS ACT, TO ESTABLISH REQUIREMENTS FOR WAIVER, AND TO PROHIBIT WAIVER IN CERTAIN CIRCUMSTANCES.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 20-511, Idaho Code, be, and the same is hereby amended to read as follows:

20-511. DIVERSION OR INFORMAL DISPOSITION OF THE PETITION. (1) Prior to the filing of any petition under this act, the prosecuting attorney may request a preliminary inquiry from the county probation officer to determine whether the interest of the public or the juvenile requires a formal court proceeding. If court action is not required, the prosecuting attorney may utilize the diversion process and refer the case directly to the county probation officer or a community-based diversion program for informal probation and counseling. <u>If the diversion process is utilized pursuant to this subsection, statements made by a juvenile in a diversion proceeding shall be inadmissible at an adjudicative proceeding on the underlying charge as substantive evidence of guilt.</u> If community service is going to be utilized pursuant to this subsection, the prosecuting attorney shall collect a fee of sixty cents (60¢) per hour for each hour of community service work the juvenile is going to perform and remit the fee to the state insurance fund for the purpose of securing worker's compensation insurance for the juvenile performing community service. However, if a county is self-insured and provides worker's compensation insurance for persons

performing community service pursuant to the provisions of this chapter, then remittance to the state insurance fund is not required.

(2) After the petition has been filed and where, at the admission or denial hearing, the juvenile admits to the allegations contained in the petition, the court may decide to make an informal adjustment of the petition. Informal adjustment includes, but is not limited to:

(a) Reprimand of the juvenile;

(b) Informal supervision with the probation department;

(c) Community service work;

(d) Restitution to the victim;

(e) Participation in a community-based diversion program.

(3) Information uniquely identifying the juvenile, the offense, and the type of program utilized shall be forwarded to the department. This information shall be maintained by the department in a statewide juvenile offender information system. Access to the information shall be controlled by the department, subject to the provisions of section 9-342, Idaho Code.

Such informal adjustment of the petition shall be conducted in the manner prescribed by the Idaho juvenile rules. When an informal adjustment is made pursuant to this section and the juvenile is to perform community service work, the court shall assess the juvenile a fee of sixty cents (60¢) per hour for each hour of community service work the juvenile is to perform. This fee shall be remitted by the court to the state insurance fund for the purpose of securing worker's compensation insurance for the juvenile performing community service. However, if a county is self-insured and provides worker's compensation insurance for persons performing community service pursuant to the provisions of this chapter, then remittance to the state insurance fund is not required.

SECTION 2. That Section 20-514, Idaho Code, be, and the same is hereby amended to read as follows:

20-514. REPRESENTATION AT ALL STAGES OF PROCEEDINGS -- APPOINTMENT OF COUNSEL - WAIVER -- PAYMENT OF COST OF LEGAL SERVICES. (1) a juvenile, who is being detained by a law enforcement officer or who is under formal charge of having committed, or who has been adjudicated for commission of, an act, omission, or status which brings him under the purview of this act, is entitled:

(a) to be represented by an attorney to the same extent as an adult having his own counsel is so entitled pursuant to section 19-852, Idaho Code; and

(b) to be provided with the necessary services and facilities of representation (including investigation and other preparation).

(2) A juvenile who is entitled to be represented by an attorney under subsection (1) is entitled:

(a) to be counseled and defended at all stages of the matter beginning with the earliest time and including revocation of probation or recommitment;

(b) to be represented in any appeal; and

(c) to be represented in any other post-adjudication or review proceeding that the attorney or the juvenile considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is a frivolous proceeding.

(3) A juvenile's right to a benefit under subsection (1) or (2) is unaffected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

(4) As early as possible in the proceedings, and in any event before the hearing of the petition on the merits, the juvenile and his parents, or guardian, shall be notified of their right to have counsel represent them. When it appears to the court that the juvenile or his parents or guardian desire counsel but are financially unable to pay for such legal services, the court shall appoint counsel to represent the juvenile and his parents or guardian; provided that in the event the court shall find that there is a conflict of interest between the interests of the juvenile and his parents or guardian, then the court shall appoint separate counsel for the juvenile, whether or not he or his parents or guardian are able to afford counsel, unless there is an intelligent waiver of the right of counsel by the juvenile, except as provided in subsection (6), and the court further determines that the best interest of the juvenile does not require the appointment of counsel. Counsel appointed under this section shall initially receive reasonable compensation from the county and the county shall have the right to be reimbursed for the cost thereof by the parents or guardian as hereafter provided in this section.

(5) Any waiver of the right to counsel by a juvenile under this act shall be made in writing, on the record, and upon a finding by the court that:

(a) the juvenile has been informed of the right to counsel and the dangers and disadvantages of self-representation; and

(b) the waiver is intelligently made after consideration of the totality of the circumstances, including but not limited to:

(i) the age, maturity, intelligence, education, competency, and comprehension of the juvenile;

(ii) the presence of the juvenile's parents or guardian;

(iii) the seriousness of the offense;

(iv) the collateral consequences of adjudication of the offense; and

(v) whether the interests of the juvenile and his parents or guardian conflict.

(6) A juvenile shall not be permitted to waive the assistance of counsel in the following circumstances:

(a) if the juvenile is under the age of fourteen (14) Years;

(b) in sentencing proceedings in which it has been recommended that the juvenile be committed to the legal custody of the department of juvenile corrections;

(c) in proceedings in which the juvenile is being adjudicated for commission of a crime of a sexual nature;

(d) in proceedings in which the juvenile is being adjudicated for commission of a felony;

(e) in hearings upon a motion to waive jurisdiction under the juvenile corrections act pursuant to section 20-508, Idaho code;

(f) in hearings upon a motion to examine the juvenile to determine if he is competent to proceed pursuant to section 20-519A, Idaho Code; or

(g) in recommitment proceedings.

~~(2)~~(7) The parents, spouse or other person liable for the support of the juvenile, or the estates of such persons, and the estate of such juvenile, shall be liable for the cost to the county of legal services rendered to the juvenile by counsel appointed pursuant to this section, unless the court finds such persons to be ~~needy persons~~ indigent persons and financially unable to pay the cost of such legal services.

~~(3)~~(8) The prosecuting attorney of each county may, on behalf of the county, recover payment or reimbursement, as the case may be, from each person who is liable for the payment or reimbursement of the cost of court appointed counsel for the juvenile, his parents or guardian under this section. In the event such payment or reimbursement is not made upon demand by the prosecuting attorney, suit may be brought against such persons by the prosecuting attorney within five (5) years after the date on which such counsel was appointed by the court.

STATEMENT OF PURPOSE (Draft 01-24-2013)

RS _____

This legislation seeks to resolve ethical conflicts that arise under 16-1614, Idaho Code, which allow an attorney to be appointed to serve in a dual capacity as both a guardian ad litem ("GAL") and an attorney for a child. An attorney serving in this dual role may be required to act in violation of the Rules of Professional Conduct for attorneys. A GAL advocates for the best interests of the child whereas an attorney advocates for what the child wants and maintains a confidential attorney-client relationship with the child. Most GALs are non-lawyer CASA volunteers. The proposed bill clarifies that an attorney may be appointed as an attorney for a child or a GAL for the child but may not serve in both roles in the same case. An attorney appointed as a GAL has the same rights and responsibilities as a non-lawyer GAL and has no additional authority even though that individual may hold a license to practice of law.

The proposed bill further amends the statute to require a specific type of representation for a child involved in a child protection action. The bill requires the appointment of a GAL for all children under the age of twelve (12) unless there is no GAL available in which case an attorney shall be appointed to represent the child. An attorney shall be appointed to represent the GAL. For children twelve (12) years of age or older, the legislation requires the appointment of counsel to represent the child absent a finding by the court that such appointment is not appropriate or practicable. The appointment of counsel allows older children to have representation and a voice in critical decisions being made about their lives.

FISCAL NOTE

There is no anticipated increase to the general fund. The impact on counties cannot be precisely calculated. Many counties already provide legal representation for both the GAL and for children over 12. In those counties, representation for the GAL will no longer be needed in cases where an attorney is appointed to represent the child. Consequently, dollars expended for legal services to represent the child could be partially offset by the dollars currently spent to retain counsel to represent the GAL. Yet, if counties do not adopt a pro bono representation program for the GALs that are not currently represented by attorneys, there could be some additional costs of representation.

LEGISLATURE OF THE STATE OF IDAHO

Sixty-second Legislature First Regular Session - 2013

IN THE SENATE

SENATE BILL NO.

BY JUDICIARY AND RULES COMMITTEE

AN ACT

RELATING TO THE RIGHT TO COUNSEL IN CHILD PROTECTION CASES; AMENDING SECTION 16-1614, IDAHO CODE, TO PROHIBIT GUARDIANS AD LITEM FROM SERVING IN DUAL CAPACITIES AND REQUIRING SPECIFIC TYPES OF REPRESENTATION IN CHILD PROTECTION CASES.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 16-1614, Idaho Code, be, and the same is hereby amended to read as follows:

16-1614. ~~RIGHT TO COUNSEL -- GUARDIAN AD LITEM~~. APPOINTMENT OF GUARDIAN AD LITEM, COUNSEL FOR GUARDIAN AD LITEM, COUNSEL FOR CHILD. (1) In any proceeding under this chapter, for a child under the age of twelve (12) years, the court shall appoint a guardian ad litem for the child or children, and shall appoint counsel to represent the guardian ad litem unless the guardian ad litem is already represented by counsel ~~to serve at each stage of the proceeding and in appropriate cases shall appoint counsel to represent the guardian, and in appropriate cases, may appoint separate counsel for the child~~. If a court does not have available to it a guardian ad litem program or a sufficient number of guardians ad litem, the court shall appoint counsel for the child. In appropriate cases, the court may appoint a guardian ad litem for the child and counsel to represent the guardian ad litem, and may in addition appoint counsel to represent the child.

(2) ~~If a court does not have available to it a guardian ad litem program or a sufficient number of guardians ad litem, the court shall appoint separate counsel for the child. For a child under the age of twelve (12) years the attorney will have the powers and duties of a guardian ad litem. For a child twelve (12) years of age or older, the court may order that the counsel act with or without the powers and duties of a guardian ad litem.~~ In any proceeding under this chapter, for a child twelve

(12) years of age or older, the court: (a) shall appoint counsel to represent the child and may, in addition, appoint a guardian ad litem; or, (b) where appointment of counsel is not practicable or not appropriate, may instead appoint a guardian ad litem for the child and shall appoint counsel to represent the guardian ad litem, unless the guardian ad litem is already represented by counsel.

(3) Counsel appointed for the child under the provisions of this section shall be paid for by the county unless the party for whom counsel is appointed has an independent estate sufficient to pay such costs.

STATEMENT OF PURPOSE

RS22181

The purpose of this legislation is authorize the Legislative Council to appoint an interim study committee to undertake and complete a study of the public defender system in Idaho. Currently there are only a handful of public defender offices within Idaho counties. The remainder of the counties contract for public defender services. The Sixth Amendment of the U.S. Constitution requires that the accused have the assistance of counsel for their defense. The State of Idaho may delegate certain obligations imposed by the Idaho Constitution to the counties but cannot abdicate its constitutional duty.

The Idaho Criminal Justice Commission has over the past three years had a subcommittee study this issue and reached the conclusion, due to the funding issues, as well as other issues, that an interim study committee would be the appropriate approach in looking at the issue.

FISCAL NOTE

The cost of the study is expected not to exceed $10,000. The study will be paid for out of the Legislative account.

Contact:
Representative Darrell Bolz
(208) 332-1000
Daniel Chadwick
Association of Counties
(208) 345-9126

LEGISLATURE OF THE STATE OF IDAHO

Sixty-second Legislature First Regular Session - 2013

IN THE HOUSE OF REPRESENTATIVES

HOUSE CONCURRENT RESOLUTION NO. 26

BY STATE AFFAIRS COMMITTEE

A CONCURRENT RESOLUTION

STATING FINDINGS OF THE LEGISLATURE AND AUTHORIZING THE LEGISLATIVE COUNCIL TO APPOINT A COMMITTEE TO UNDERTAKE AND COMPLETE A STUDY OF POTENTIAL APPROACHES TO PUBLIC DEFENSE REFORM.

Be It Resolved by the Legislature of the State of Idaho:

WHEREAS, the responsibility of providing counsel to those constitutionally entitled to representation at public expense is currently borne by the counties; and

WHEREAS, though the State of Idaho may delegate certain obligations imposed by the Idaho Constitution to the counties, it must do so in a manner that does not abdicate the constitutional duty; and

WHEREAS, for the past three years, the Idaho Criminal Justice Commission's Public Defense Subcommittee has committed itself to the task of identifying deficiencies in Idaho's public defense system and developing recommendations for public defense reform; and

WHEREAS, the Idaho Criminal Justice Commission's Public Defense Subcommittee has identified deficiencies in Idaho's public defense system. Such deficiencies include, but are not limited to: a lack of uniformity in indigency determination, appointment and waiver of counsel, contribution and recoupment practices, public defense contracting practices and data reporting; excessive caseloads and workloads; a lack of independence of the public defense function; a lack of training and resources for attorneys providing public defense services, particularly in the areas of juvenile defense, child protection and mental health commitment; the existence of flat fee contracts for public defense services; and county commissioners' lack of access to information and resources to assist in the provision of public defense; and

WHEREAS, the Idaho Criminal Justice Commission's Public Defense Subcommittee's analysis of nationwide approaches to addressing such deficiencies shows that the most significant trend has been toward state oversight of the public defense system that includes statewide standards and, in many instances, state moneys; and

WHEREAS, the Idaho Criminal Justice Commission's Public Defense Subcommittee has narrowed its efforts to consideration of a public defense model where, although public defense delivery at the trial level would remain primarily funded and administered at the county level, the authority for a public defense system would be statutorily delegated to an independent commission authorized to promulgate and enforce certain rules and standards with which counties are required to comply, including: statewide training and continuing legal education requirements for public defense attorneys; data reporting requirements; requirements relating to contracts entered into between counties and private providers of public defense services;

standards for the qualification of public defense attorneys; and caseload and workload standards for public defense attorneys; and

WHEREAS, the Idaho Criminal Justice Commission's Public Defense Subcommittee has also considered a public defense model where the counties' statutory authority to provide for counsel at public expense would be limited to the creation of an office of public defender and a requirement that each county participate in a statewide association of public defense attorneys.

NOW, THEREFORE, BE IT RESOLVED by the members of the First Regular Session of the Sixty-second Idaho Legislature, the House of Representatives and the Senate concurring therein, that the Legislative Council is authorized to appoint a committee to undertake and complete a study of potential approaches to public defense reform including, but not limited to: the creation, funding and implementation of a public defense commission; and requirements that counties operate offices of public defenders and join a statewide association of public defense attorneys. The committee shall consist of ten legislators, with five from the Senate and five from the House of Representatives. The Legislative Council shall authorize the committee to receive input, advice and assistance from interested and affected parties who are not members of the Legislature.

BE IT FURTHER RESOLVED that the cochairmen of the committee are authorized to appoint advisors with technical expertise in the area of public defense and are expected to receive input from stakeholders in the criminal justice system of Idaho.

BE IT FURTHER RESOLVED that any advisors to the committee who are not legislative members shall not be reimbursed from legislative funds for per diem, mileage or other expenses and shall not have voting privileges.

BE IT FURTHER RESOLVED that the commission shall report its findings, recommendations and proposed legislation, if any, to the Second Regular Session of the Sixty-second Idaho Legislature.

IDAHO CRIMINAL JUSTICE COMMISSION

"Collaborating for a Safer Idaho"
Established 2005

C.L. "BUTCH" OTTER
Governor

December 17, 2012

Ms. Patricia Tobias
Administrative Director of the Courts
P.O. Box 83720
Boise, ID 83720-0101

RE: Transmittal of Proposed Amendments to I.C.R. 5 & I.M.C.R. 6

Dear Patti:

As you know, the Idaho Criminal Justice Commission's Public Defense Subcommittee was formed in December of 2009 to develop recommendations for improvement of Idaho's public defense system. Since its creation, the subcommittee has made considerable progress in identifying and investigating problem areas in Idaho's system and in reaching consensus as to what recommendations to make in order to improve it.

One particular area of concern is the inconsistency in how counsel is appointed and waived from county to county. In terms of appointment of counsel, the subcommittee has found that some courts—expecting that a jail sentence will ultimately not be imposed—do not appoint counsel whereas other courts appoint counsel if the applicable statute provides for the mere possibility of a jail sentence. Though the Constitution does not require that a person be provided with an attorney unless he or she is actually imprisoned, the subcommittee has concluded that wise public policy would call for a uniform standard in Idaho. As such, the subcommittee has proposed amendments to Idaho Code §19-851's definition of "serious crime" so that it includes any offense "the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correctional facility regardless of whether actually imposed." The proposed amendments to I.C.R. 5 and I.M.C.R. 6 transmitted herewith account for this uniform and consistent standard for attachment of the right to counsel.

In terms of waiver of the right to counsel, once the right attaches, the subcommittee has similarly found that there is a lack of uniformity in court practices. As such, the subcommittee has concluded that a standard waiver form

and/or colloquy that accounts for advisement of the various factors mandated by the Sixth Amendment, state and federal court cases interpreting the Sixth Amendment, and Idaho statutes would promote a uniform and thorough waiver practice throughout Idaho that is documentable and verifiable on a case-by-case basis. The proposed amendments to I.C.R. 5 and I.M.C.R. 6 (and corresponding form waiver) transmitted herewith account for such a uniform and consistent advisement.

The subcommittee believes that these proposed amendments would contribute to a uniform and consistent vindication of the Sixth Amendment right to counsel in Idaho and hereby respectfully requests your consideration. We thank you for your attention to this matter and for your support of our efforts. We also welcome any questions, comments, or concerns you may have.

Respectfully,

Daniel G. Chadwick

Daniel G. Chadwick
Chair, Public Defense Subcommittee

DLC:jh
Encs. Amendments to Idaho Criminal Rule 5
Form Waiver
Amendments to Idaho Misdemeanor Criminal Rule 6
Via e-mail

In the Supreme Court of the State of Idaho

IN RE: AMENDMENTS TO IDAHO CRIMINAL RULE 5) **ORDER**

The Court having reviewed a recommendation from the Administrative Conference to amend the Idaho Criminal Rules, and the Court being fully informed;

NOW, THEREFORE, IT IS HEREBY ORDERED, that Idaho Criminal Rule 5 be, and is hereby, amended to read as follows:

Rule 5. Initial appearance before magistrate - Advice to defendant - Plea in misdemeanors - Initial appearance on grand jury indictment.

. . . .

(g) Right to Counsel. (1) If a defendant is charged with an offense the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correctional facility regardless of whether actually imposed, and the defendant appears without counsel, the court shall advise the defendant of:

(A) the right to counsel;

(B) the right to apply for court appointed counsel if the defendant cannot afford to hire private counsel; and

(C) the right to request counsel at any stage of the proceedings.

(2) If the defendant wishes to represent him or herself, the court shall ensure that a knowing, voluntary, and intelligent written waiver of the right to counsel is entered orally on the record and/or in writing.

(3) Prior to accepting any waiver pursuant to subsection (2), the trial court shall advise the defendant of the following:

(A) the nature of the charges;

(B) the range of allowable punishments;

(C) that there may be defenses;

(D) that there may be mitigating circumstances; and

(E) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the dangers and disadvantages of the decision to waive counsel.

(4) The court may appoint counsel for the limited purpose of advising and consulting with the defendant as to the waiver.

(5) Written waiver for purposes of subsection (2) shall be in substantially the following form:

[Court Heading]

STATE OF IDAHO, Plaintiff, vs. _____, Defendant.	Case No. WAIVER OF RIGHT TO COUNSEL

PLEASE TAKE NOTICE

YOU HAVE BEEN CHARGED with the following offense(s): _____. If convicted you could be sentenced to a maximum jail sentence of _____ and a maximum fine of $_____. You have the right to counsel if you have been charged with an offense the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correctional facility;

1. You have the right to the aid of an attorney in every stage of the proceedings, including when making the decision to waive your right to an attorney and/or plead guilty to the charge(s) against you;

2. If you cannot afford to hire an attorney, you may apply to have an attorney appointed to you at public expense pursuant to I.C. § 19-852;

3. You may be required to reimburse the county for services of a court-appointed attorney depending on your ability to pay pursuant to I.C. §19-854;

4. There may be legal defenses available to you and mitigating circumstances surrounding the charge(s) against you. An attorney can assist you by evaluating the facts and mitigating circumstances of your case to determine if you have any defenses to the charge(s) and by explaining what to expect at different stages of the proceedings;

5. An attorney can also ensure that your constitutional rights are not violated by law enforcement or in court proceedings and can assist you with:

- Presenting any defenses;
- Investigating facts and evidence;
- Making motions to ensure protection of your constitutional rights;
- Properly applying the rules of evidence and procedure;
- Jury selection;
- Direct and cross examination of witnesses; and
- Objecting to improper questioning.

6. An attorney can assist you in negotiating with the prosecuting attorney and in exploring possible plea agreements.

7. If you choose to forgo the representation of an attorney and proceed by yourself, you will be responsible for properly applying the rules of evidence and procedure. The Court cannot and will not assist in this regard.

WHEREFORE, I, _____, the above-named Defendant, desire to waive my right to an attorney as set forth herein.

I AFFIRMATIVELY REPRESENT that:

- I am _____ years of age.
- I have had _____ years of education.
- I do/do not read and write the English language.
- I have/ have not been provided with an interpreter to help fill out this form.
- I am not under the influence of any alcohol, drugs, or other mind-affecting substances at this time.
- I am fully aware of the present proceedings and of their legal significance.
- I am/ am not under the care of a mental health professional.
- No one has made any promises, threats, or other inducements to get me to waive my right to counsel in this action.

I HEREBY ACKNOWLEDGE AND WAIVE MY RIGHT TO AN ATTORNEY in the above-captioned case pursuant to I.C. §19-857. This waiver is given knowingly, intelligently, and voluntarily.

DATED this _____ day of _____, 20____.

_____
DEFENDANT SIGNATURE

. . . .

IT IS FURTHER ORDERED, that this order shall be effective the first day of July, 2013.

IT IS FURTHER ORDERED, that the above designation of the striking of words from the Rule by lining through them is for the purposes of information only as amended, and NO OTHER AMENDMENTS ARE INTENDED. The lining through shall not be considered a part of the permanent Idaho Criminal Rules.

IT IS FURTHER ORDERED, that the Clerk of the Court shall cause notice of this Order to be published in one issue of *The Advocate*.

DATED this _____ day of _____, 20____.

By Order of the Supreme Court

_____
Roger S. Burdick
Chief Justice

ATTEST:

_____
Stephen W. Kenyon, Clerk

In the Supreme Court of the State of Idaho

IN RE: AMENDMENTS TO IDAHO MISDEMEANOR CRIMINAL RULE 6) **ORDER**

The Court having reviewed a recommendation from the Administrative Conference to amend the Idaho Misdemeanor Criminal Rules, and the Court being fully informed;

NOW, THEREFORE, IT IS HEREBY ORDERED, that Idaho Misdemeanor Criminal Rule 6 be, and is hereby, amended to read as follows:

Rule 6. First appearance of defendant - Plea of defendant - Trial date notice or continuance notice.

. . . .

(c) Duties of Court to Advise Defendant of Rights. (1) At the first appearance of the defendant before the court on a uniform citation or sworn complaint, the court shall inform the defendant of his constitutional rights and the rights provided in the Idaho Criminal Rules, and these rules. Such advice of rights may be announced to all defendants at each session of court at the commencement of the court hearing, rather than advising each of the defendants individually when they come before the court. If the offense has a permissible penalty of imprisonment which will be considered as possible punishment by the court, or if the conviction of the offense could cause a subsequent conviction to be enhanced from a misdemeanor to a felony, then or in either of such events the defendant shall be advised that he has the right to court appointed counsel at public expense if he is indigent. If the defendant is found by the court to be entitled to court appointed counsel, the court shall appoint such counsel unless the defendant voluntarily waives his right to counsel.

(2) If a defendant is charged with an offense the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correctional facility regardless of whether actually imposed, and the defendant appears without counsel, the court shall advise the defendant of:

(A) the right to counsel;

(B) the right to apply for court appointed counsel if the defendant cannot afford to hire private counsel; and

(C) the right to request counsel at any stage of the proceedings.

(3) If the defendant wishes to represent him or herself, the court shall ensure that a knowing, voluntary, and intelligent written waiver of the right to counsel is entered orally on the record and/or in writing.

(4) Prior to accepting any waiver pursuant to subsection (3), the trial court shall advise the defendant of the following:

(A) the nature of the charges;

(B) the range of allowable punishments;

(C) that there may be defenses;

(D) that there may be mitigating circumstances; and

(E) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the dangers and disadvantages of the decision to waive counsel.

(5) The court may appoint counsel for the limited purpose of advising and consulting with the defendant as to the waiver.

(6) Written waiver for purposes of subsection (3) shall be in substantially the following form:[1]

. . . .

IT IS FURTHER ORDERED, that this order shall be effective the first day of July, 2013.

IT IS FURTHER ORDERED, that the above designation of the striking of words from the Rule by lining through them is for the purposes of information only as amended, and NO OTHER AMENDMENTS ARE INTENDED. The lining through shall not be considered a part of the permanent Idaho Misdemeanor Criminal Rules.

IT IS FURTHER ORDERED, that the Clerk of the Court shall cause notice of this Order to be published in one issue of *The Advocate*.

DATED this _____ day of _____, 20____.

By Order of the Supreme Court

_____
Roger S. Burdick
Chief Justice

ATTEST:

_____
Stephen W. Kenyon, Clerk

[1] See proposed form waiver above.

STATEMENT OF PURPOSE

RS21688C1

The purpose of the legislation is to update Chapter 8, Title 19, Idaho Code, to achieve uniformity in the provision of counsel at public expense as well as technical consistency.

The amendments replace the phrase, "needy person," with the phrase, "indigent person," and remove statutory cross-references to code sections that have been repealed.

The legislation ensures consistent and uniform appointment of counsel, in conformance with the Sixth Amendment, by revising the definition of the term, "serious crime," to include offenses which carry the mere possibility of incarceration. It further does so by providing a uniform standard of eligibility.

The amendments restrict the use of information provided to establish eligibility, thereby guarding the Fifth Amendment privilege against self-incrimination. They also limit recovery of the costs of counsel to those associated with convictions. Finally, the bill expands data reporting requirements to all attorneys that provide representation at public expense.

FISCAL NOTE

The proposed legislation would have no impact on the state general fund. The fiscal impact to counties cannot be specifically calculated. Currently, counties spend more than $16 million annually on indigent defense. The present statutes contain no guidelines or presumptions for determining whether a defendant is entitled to representation at public expense, and courts can only exercise their best judgment as to whether a defendant meets the general standard of being "unable to provide for the full payment of an attorney and all other necessary expenses of representation." The guidelines and presumptions in this legislation should result in greater uniformity and predictability in making these determinations. The best estimate, however, is that the net costs to the counties will remain approximately the same.

Contact:
Brent Reinke
Idaho Criminal Justice Commission
(208) 658-2115

LEGISLATURE OF THE STATE OF IDAHO
Sixty-second Legislature First Regular Session - 2013

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 147

BY JUDICIARY, RULES, AND ADMINISTRATION COMMITTEE

AN ACT

RELATING TO EXAMINATION OF CASE AND DISCHARGE OR COMMITMENT OF ACCUSED; AMENDING SECTION 19-851, IDAHO CODE, TO DEFINE A TERM, TO REVISE DEFINITIONS AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 19-852, IDAHO CODE, TO REVISE TERMINOLOGY, TO REVISE CODE REFERENCES AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 19-853, IDAHO CODE, TO REVISE TERMINOLOGY, TO REVISE CODE REFERENCES AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 19-854, IDAHO CODE, TO ESTABLISH PROVISIONS RELATING TO A DETERMINATION OF INDIGENCY, TO REVISE TERMINOLOGY, TO PROHIBIT THE USE OF CERTAIN INFORMATION FOR CERTAIN PURPOSES WITH EXCEPTIONS, TO REVISE PROVISIONS RELATING TO REIMBURSEMENT FOR CERTAIN COSTS AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 19-855, IDAHO CODE, TO REVISE TERMINOLOGY; REPEALING SECTION 19-856, IDAHO CODE, RELATING TO THE APPOINTMENT OF A SUBSTITUTE ATTORNEY; AMENDING SECTION 19-857, IDAHO CODE, TO REMOVE A REQUIREMENT THAT A CERTAIN WAIVER BE IN WRITING OR OTHER RECORD AND TO MAKE A TECHNICAL CORRECTION; AMENDING SECTION 19-858, IDAHO CODE, TO REVISE PROVISIONS RELATING TO REIMBURSEMENT TO A COUNTY AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 19-859, IDAHO CODE, TO REVISE PROVISIONS RELATING TO A CERTAIN DUTY OF THE BOARD OF COUNTY COMMISSIONERS OF EACH COUNTY AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 19-860, IDAHO CODE, TO REVISE TERMINOLOGY AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 19-863, IDAHO CODE, TO REVISE TERMINOLOGY AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 19-864, IDAHO CODE, TO REVISE TERMINOLOGY, TO REVISE PROVISIONS RELATING TO CERTAIN RECORDS AND A REPORT AND TO MAKE TECHNICAL CORRECTIONS; AND AMENDING SECTION 19-865, IDAHO CODE, TO REVISE TERMINOLOGY AND TO MAKE TECHNICAL CORRECTIONS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 19-851, Idaho Code, be, and the same is hereby amended to read as follows:

19-851. RIGHT TO REPRESENTATION BY COUNSEL -- DEFINITIONS. In this act, the term:

(1) "Defending attorney" means any attorney employed by the office of public defender, contracted by the county or otherwise assigned to represent adults or juveniles at public expense;

(~~a~~2) "Detain" means to have in custody or otherwise deprive of freedom of action;

(~~b~~3) "Expenses," when used with reference to representation under this act, includes the expenses of investigation, other preparation~~,~~ and trial;

(~~c~~4) "~~Needy~~Indigent person" means a person who, at the time his need is determined pursuant to section 19-854, Idaho Code, is unable to provide for

the full payment of an attorney and all other necessary expenses of representation;

(~~d~~5) "Serious crime" ~~includes:~~

~~(1) a felony;~~

~~(2) any misdemeanor or offense the penalty for which, excluding imprisonment for nonpayment of a fine, includes the possibility of confinement~~ means any offense the penalty for which includes the possibility of confinement, incarceration, imprisonment or detention in a correctional facility, regardless of whether actually imposed.

SECTION 2. That Section 19-852, Idaho Code, be, and the same is hereby amended to read as follows:

19-852. RIGHT TO COUNSEL OF ~~NEEDY~~ INDIGENT PERSON -- REPRESENTATION AT ALL STAGES OF CRIMINAL AND COMMITMENT PROCEEDINGS -- PAYMENT. (~~a~~1) An ~~needy~~ indigent person who is being detained by a law enforcement officer, who is confined or is the subject of hospitalization proceedings pursuant to sections~~s~~ 18-212, ~~18-214,~~ 66-322, 66-326, 66-329, ~~or~~ 66-40~~9~~4 or 66-406, Idaho Code, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled:

(~~1~~a) ~~t~~To be represented by an attorney to the same extent as a person having his own counsel is so entitled; and

(~~2~~b) ~~t~~To be provided with the necessary services and facilities of representation ~~(~~including investigation and other preparation~~)~~. The attorney, services~~,~~ and facilities and the court costs shall be provided at public expense to the extent that the person is, at the time the court determines ~~need~~ indigency pursuant to section 19-854, Idaho Code, unable to provide for their payment.

(~~b~~2) An ~~needy~~ indigent person who is entitled to be represented by an attorney under subsection (~~a~~1) of this section is entitled:

(~~1~~a) ~~t~~To be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation;

(~~2~~b) ~~t~~To be represented in any appeal;

(~~3~~c) ~~t~~To be represented in any other post-conviction or post-commitment proceeding that the attorney or the ~~needy~~ indigent person considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.

(~~c~~3) An ~~needy~~ indigent person's right to a benefit under subsection (~~a~~1) or (~~b~~2) of this section is unaffected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

SECTION 3. That Section 19-853, Idaho Code, be, and the same is hereby amended to read as follows:

19-853. DUTY TO NOTIFY ACCUSED OR DETAINED OF RIGHT TO COUNSEL -- APPOINTMENT OF COUNSEL. (~~a~~1) If a person who is being detained by a law enforcement officer, or who is confined or who is the subject of hospitaliza-

tion proceedings pursuant to sections 66-322, 66-326, 66-329, or 66-4094 or 66-406, Idaho Code, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned, upon commencement of detention, or the court, upon formal charge or hearing, as the case may be, shall:

(1a) eClearly inform him of his right to counsel and of the right of an needy indigent person to be represented by an attorney at public expense; and

(2b) iIf the person detained or charged does not have an attorney, notify the public defender defending attorney or trial court concerned, as the case may be, that he is not so represented. As used in this subsection, the term "commencement of detention" includes the taking into custody of a probationer.

(b2) Upon commencement of any later judicial proceeding relating to the same matter, including, but not limited to, preliminary hearing, arraignment, trial, any post-conviction proceeding, or post-commitment proceeding, the presiding officer shall clearly inform the person so detained or charged of his right to counsel and of the right of an needy indigent person to be represented by an attorney at public expense. Provided, the appointment of an attorney at public expense in uniform post-conviction procedure act proceedings shall be in accordance with section 19-4904, Idaho Code.

(c3) If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the public defender defending attorney or assign an attorney, as the case may be.

(d4) Upon notification by the court or assignment under this section, the public defender or assigned attorney, as the case may be, defending attorney shall represent the person with respect to whom the notification or assignment is made.

SECTION 4. That Section 19-854, Idaho Code, be, and the same is hereby amended to read as follows:

19-854. DETERMINATION OF NEED INDIGENCY -- FACTORS CONSIDERED -- PARTIAL PAYMENT BY ACCUSED -- REIMBURSEMENT. (a1) The determination of whether a person covered by under section 19-852, Idaho Code, is an needy indigent person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under section 19-858, Idaho Code, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each proceeding, whether he is an needy indigent person.

(2) The court concerned shall presume that the following persons are indigent persons unless such a determination is contrary to the interests of justice:

(a) Persons whose current monthly income does not exceed one hundred eighty-seven percent (187%) of the federal poverty guidelines issued annually by the federal department of health and human services;

(b) Persons who receive, or whose dependents receive, public assistance pursuant to title 56, Idaho Code, in the form of food assistance, health coverage, cash assistance or child care assistance; or

(c) Persons who are currently serving a sentence in a correctional facility or are being housed in a mental health facility.

(~~b~~3) The court concerned may determine that persons other than those described in subsection (2) of this section are indigent persons. In determining whether a person is an ~~needy~~ indigent person and in determining the extent of his inability to pay, the court concerned may consider such factors as income, property owned, outstanding obligations, ~~and~~ the number and ages of his dependents and the cost of bail.

(4) Release on bail does not necessarily prevent ~~him~~ a person from being an ~~needy~~ indigent person.

(5) In each case, the person shall, subject to the penalties for perjury, certify in writing or by other record such material factors relating to his ability to pay as the court prescribes by rule. No information provided by a person pursuant to this subsection may be used as substantive evidence in any criminal or civil proceeding against the person except:

(a) For impeachment purposes;

(b) In a prosecution for perjury or contempt committed in providing the information; or

(c) In an attempt to enforce an obligation to reimburse the state for the cost of counsel.

(~~c~~6) To the extent that a person covered ~~by~~ under section 19-852, Idaho Code, is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court may order him to provide for their payment.

(~~d~~7) ~~A needy~~ Upon conviction, notwithstanding the form of judgment or withheld judgment, plea of guilty or finding of guilt for any crime regardless of the original crime or number of counts, an indigent person who receives the services of an attorney provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those services related to the conviction, plea of guilty or finding of guilt, unless the requirement would impose a manifest hardship on the indigent person. The ~~immediate~~ current inability of the ~~needy~~ indigent person to pay the reimbursement shall not, in and of itself, restrict the court from ordering reimbursement.

SECTION 5. That Section 19-855, Idaho Code, be, and the same is hereby amended to read as follows:

19-855. QUALIFICATIONS OF COUNSEL. No person may be given the primary responsibility of representing an ~~needy~~ indigent person unless he is licensed to practice law in this state and is otherwise competent to counsel and defend a person charged with a crime.

SECTION 6. That Section 19-856, Idaho Code, be, and the same is hereby repealed.

SECTION 7. That Section 19-857, Idaho Code, be, and the same is hereby amended to read as follows:

19-857. WAIVER OF COUNSEL -- CONSIDERATION BY COURT. A person who has been appropriately informed of his right to counsel may waive ~~in writing,~~

~~or by other record,~~ any right provided by this act, if the court concerned, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education~~,~~ and familiarity with the English language and the complexity of the crime involved.

SECTION 8. That Section 19-858, Idaho Code, be, and the same is hereby amended to read as follows:

19-858. REIMBURSEMENT TO COUNTY -- WHEN AUTHORIZED. (~~a~~1) The prosecuting attorney of each county may, on behalf of the county, recover payment or reimbursement, as the case may be, from each person who has received legal assistance or another benefit under this act:

(~~1~~a) ~~t~~To which he was not entitled;

(~~2~~b) ~~w~~With respect to which he was not an ~~needy~~ indigent person when he received it; or

(~~3~~c) ~~w~~With respect to which he has failed to make the certification required ~~by~~ under section 19-854~~;~~, Idaho Code, and for which he refuses to pay or reimburse. Suit must be brought within five (5) years after the date on which the aid was received.

(~~b~~2) The prosecuting attorney of each county may, on behalf of the county, recover payment or reimbursement, as the case may be, from each person other than a person covered ~~by~~ under subsection (~~a~~1) ~~above,~~ of this section who has received legal assistance under this act and who, on the date on which suit is brought, is financially able to pay or reimburse the county for it without manifest hardship according to the standards of ability to pay applicable under sections 19-851, 19-852 and 19-854, Idaho Code, but refuses to do so. Suit must be brought within three (3) years after the date on which the benefit was received.

(~~c~~3) Amounts recovered under this section shall be paid into the county general fund.

SECTION 9. That Section 19-859, Idaho Code, be, and the same is hereby amended to read as follows:

19-859. PUBLIC DEFENDER AUTHORIZED -- COURT APPOINTED ATTORNEYS -- JOINT COUNTY PUBLIC DEFENDERS. (~~a~~1) The board of county commissioners of each county shall provide for the representation of ~~needy~~ indigent persons and other individuals who ~~with respect to serious crimes are subject to proceedings in the county or are detained in the county by law enforcement officers~~ are entitled to be represented by an attorney at public expense. They shall provide this representation by:

(~~1~~a) ~~e~~Establishing and maintaining an office of public defender;

(~~2~~b) ~~a~~Arranging with the courts ~~of criminal jurisdiction~~ in the county to assign attorneys on an equitable basis through a systematic, coordinated plan; or

(~~3~~c) ~~a~~Adopting a combination of these alternatives.

Until the board elects an alternative, it shall be considered as having elected the alternative provided in subsection (~~a~~1)(~~2~~b) of this section.

(~~b~~2) If it elects to establish and maintain an office of public defender, the board of county commissioners of a county may join with the board of county commissioners of one (1) or more other counties to establish and maintain a joint office of public defender. In that case, the participating counties shall be treated for the purposes of this act as if they were one (1) county.

(~~c~~3) If the board of county commissioners of a county elects to arrange with the courts ~~of criminal jurisdiction~~ in the county to assign attorneys, a court of the county may provide for advance assignment of attorneys, subject to later approval by it, to facilitate representation of matters arising before appearance in court.

SECTION 10. That Section 19-860, Idaho Code, be, and the same is hereby amended to read as follows:

19-860. PUBLIC DEFENDER -- TERM -- COMPENSATION -- APPOINTMENT -- QUALIFICATIONS -- COURT APPOINTED ATTORNEYS -- COMPENSATION. (~~a~~1) If the board of county commissioners of a county elects to establish and maintain an office of public defender and/or juvenile public defender, the board shall:

(~~1~~a) Prescribe the qualifications of such public defender, his term of office, ~~(~~which may not be less than two (2) years~~)~~, and his rate of annual compensation, and, if so desired by the board, a rate of compensation for extraordinary services not recurring on a regular basis. So far as is possible, the compensation paid to such public defender shall not be less than the compensation paid to the county prosecutor for that portion of his practice devoted to criminal law.

(~~2~~b) Provide for the establishment, maintenance and support of his office. The board of county commissioners shall appoint a public defender and/or juvenile public defender from a panel of not more than five (5) and not fewer than three (3) persons, ~~(~~if that many are available~~)~~, designated by a committee of lawyers appointed by the administrative judge of the judicial district encompassing the county or his designee. To be a candidate, a person must be licensed to practice law in this state and must be competent to counsel and defend a person charged with a crime. During his incumbency, such public defender may engage in the practice of civil law and criminal law other than in the discharge of the duties of his office, unless he is prohibited from doing so by the board of county commissioners.

(~~b~~2) If a court before whom a person appears upon a formal charge assigns an attorney other than a public defender to represent an ~~needy~~ indigent person, the appropriate district court, upon application, shall prescribe a reasonable rate of compensation for his services and shall determine the direct expenses necessary to representation for which he should be reimbursed. The county shall pay the attorney the amounts so prescribed. The attorney shall be compensated for his services with regard to the complexity of the issues, the time involved~~,~~ and other relevant considerations.

SECTION 11. That Section 19-863, Idaho Code, be, and the same is hereby amended to read as follows:

19-863. DEFENSE EXPENSES -- ALLOCATION IN JOINTLY ESTABLISHED OFFICES. (~~a~~1) Subject to section 19-861, Idaho Code, any direct expense, including the cost of a transcript that is necessarily incurred in representing an ~~needy~~ indigent person under this act, is a county charge against the county on behalf of which the service is performed.

(~~b~~2) If two (2) or more counties jointly establish an office of public defender, the expenses not otherwise allocable among the participating counties under subsection (~~a~~1) of this section shall be allocated, unless the counties otherwise agree, on the basis of population according to the most recent decennial census.

SECTION 12. That Section 19-864, Idaho Code, be, and the same is hereby amended to read as follows:

19-864. RECORDS OF ~~DEFENSE~~ DEFENDING ATTORNEYS -- ANNUAL REPORT OF ~~PUBLIC DEFENDER'S OFFICE~~ DEFENDING ATTORNEYS. (~~a~~1) A defending attorney shall keep appropriate records respecting each ~~needy~~ person whom he represents under this act.

(~~b~~2) ~~The public defender in those counties electing to establish and maintain such an office,~~ Defending attorneys shall submit an annual report to the board of county commissioners and the appropriate administrative district judge showing the number of persons represented under this act, the crimes involved~~, the outcome of each case,~~ and the expenditures, ~~(totalled~~ totaled by kind~~)~~, made in carrying out the responsibilities imposed by this act. ~~A copy of the report shall also be submitted to each court having criminal jurisdiction in the counties that the program serves.~~

SECTION 13. That Section 19-865, Idaho Code, be, and the same is hereby amended to read as follows:

19-865. APPLICATION OF ACT -- STATE COURTS -- FEDERAL COURTS. This act applies only to representation in the courts of this state, except that it does not prohibit a ~~public defender~~ defending attorney from representing an ~~needy~~ indigent person in a federal court of the United States, if:

(~~a~~1) The matter arises out of or is related to an action pending or recently pending in a court of criminal jurisdiction of the state; or

(~~b~~2) Representation is under a plan of the United States District Court as required by the ~~C~~criminal ~~J~~justice ~~A~~act of 1964, ~~(~~18 U.S.C. 3006A~~)~~, and is approved by the board of county commissioners.

STATEMENT OF PURPOSE

RS21689

This legislation seeks to resolve ethical conflicts that arise under 16-1614, Idaho Code, which allow an attorney to be appointed to serve in a dual capacity as both a guardian ad litem ("GAL") and an attorney for a child. An attorney serving in this dual role may be required to act in violation of the Rules of Professional Conduct for attorneys. A GAL advocates for the best interests of the child whereas an attorney advocates for what the child wants and maintains a confidential attorney-client relationship with the child. Most GALs are non-lawyer CASA volunteers. The proposed bill clarifies that an attorney may be appointed as an attorney for a child or a GAL for the child but may not serve in both roles in the same case. An attorney appointed as a GAL has the same rights and responsibilities as a non-lawyer GAL and has no additional authority even though that individual may hold a license to practice law.

The proposed bill further amends the statute to require a specific type of representation for a child involved in a child protection action. The bill requires the appointment of a GAL for all children under the age of twelve (12) unless there is no GAL available in which case an attorney shall be appointed to represent the child. An attorney shall be appointed to represent the GAL. For children twelve (12) years of age or older, the legislation requires the appointment of counsel to represent the child absent a finding by the court that such appointment is not appropriate or practicable. The appointment of counsel allows older children to have representation and a voice in critical decisions being made about their lives.

FISCAL NOTE

There is no anticipated increase to the general fund. The impact on counties cannot be precisely calculated. Because the current statute does not provide uniform standards for representation of children and guardian ad litems in child protection cases, the net impact of uniform representation cannot be predicted.

Contact:
Brent Reinke
Idaho Criminal Justice Commission
(208) 658-2115

LEGISLATURE OF THE STATE OF IDAHO
Sixty-second Legislature First Regular Session - 2013

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 148

BY JUDICIARY, RULES, AND ADMINISTRATION COMMITTEE

AN ACT

RELATING TO THE CHILD PROTECTIVE ACT; AMENDING SECTION 16-1614, IDAHO CODE, TO REVISE PROVISIONS RELATING TO THE APPOINTMENT OF A GUARDIAN AD LITEM AND TO REVISE PROVISIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR A GUARDIAN AD LITEM AND FOR A CHILD.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 16-1614, Idaho Code, be, and the same is hereby amended to read as follows:

16-1614. ~~RIGHT TO~~ APPOINTMENT OF GUARDIAN AD LITEM, COUNSEL ~~--~~ FOR GUARDIAN AD LITEM, COUNSEL FOR CHILD. (1) In any proceeding under this chapter for a child under the age of twelve (12) years, the court shall appoint a guardian ad litem for the child or children ~~to serve at each stage of the proceeding~~ and ~~in appropriate cases~~ shall appoint counsel to represent the guardian~~, and in appropriate cases, may appoint separate~~ ad litem, unless the guardian ad litem is already represented by counsel ~~for the child~~. If a court does not have available to it a guardian ad litem program or a sufficient number of guardians ad litem, the court shall appoint counsel for the child. In appropriate cases, the court may appoint a guardian ad litem for the child and counsel to represent the guardian ad litem and may, in addition, appoint counsel to represent the child.

(2) ~~If a court does not have available to it a guardian ad litem program or a sufficient number of guardians ad litem, the court shall appoint separate counsel for the child. For a child under the age of twelve (12) years the attorney will have the powers and duties of a guardian ad litem. For a child twelve (12) years of age or older, the court may order that the counsel act with or without the powers and duties of a guardian ad litem~~ In any proceeding under this chapter for a child twelve (12) years of age or older, the court:

(a) Shall appoint counsel to represent the child and may, in addition, appoint a guardian ad litem; or

(b) Where appointment of counsel is not practicable or not appropriate, may appoint a guardian ad litem for the child and shall appoint counsel to represent the guardian ad litem, unless the guardian ad litem is already represented by counsel.

(3) Counsel appointed for the child under the provisions of this section shall be paid for by the county unless the party for whom counsel is appointed has an independent estate sufficient to pay such costs.

STATEMENT OF PURPOSE

RS21690C1

The purpose of the legislation is to clarify the circumstances in which juveniles are appointed counsel at public expense and to limit the circumstances in which juveniles may waive their right to counsel. The right to counsel would attach for a juvenile in any instance he is detained by a law enforcement officer or is under formal charge of having committed, or has been adjudicated for commission of, an act, omission, or status which brings him under the purview of the Juvenile Corrections Act. Juveniles would only be allowed to waive their right to counsel if they are charged with certain, non-serious offenses.

The legislation would also limit the use of information provided by a juvenile in pre-adjudication diversion proceedings so as to balance the Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel of the juvenile with the government's interest in facilitating informal disposition of juvenile proceedings.

FISCAL NOTE

The proposed legislation would have no impact on the state general fund. The impact on counties cannot be precisely calculated. Because the current statute does not provide uniform standards for waiver, the net impact on the number of waivers allowed cannot be predicted.

Contact:
Brent Reinke
Idaho Criminal Justice Commission
(208) 658-2115

LEGISLATURE OF THE STATE OF IDAHO
Sixty-second Legislature First Regular Session - 2013

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 149

BY JUDICIARY, RULES, AND ADMINISTRATION COMMITTEE

AN ACT

RELATING TO THE JUVENILE CORRECTIONS ACT; AMENDING SECTION 20-511, IDAHO CODE, TO PROVIDE THAT CERTAIN STATEMENTS ARE INADMISSIBLE AT CERTAIN PROCEEDINGS AND TO MAKE A TECHNICAL CORRECTION; AND AMENDING SECTION 20-514, IDAHO CODE, TO ESTABLISH PROVISIONS RELATING TO REPRESENTATION BY COUNSEL OF CERTAIN JUVENILES, TO PROVIDE REQUIREMENTS RELATING TO A WAIVER OF THE RIGHT TO COUNSEL BY CERTAIN JUVENILES AND TO REVISE PROVISIONS RELATING TO REIMBURSEMENT OF CERTAIN COSTS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 20-511, Idaho Code, be, and the same is hereby amended to read as follows:

20-511. DIVERSION OR INFORMAL DISPOSITION OF THE PETITION. (1) Prior to the filing of any petition under this act, the prosecuting attorney may request a preliminary inquiry from the county probation officer to determine whether the interest of the public or the juvenile requires a formal court proceeding. If court action is not required, the prosecuting attorney may utilize the diversion process and refer the case directly to the county probation officer or a community-based diversion program for informal probation and counseling. <u>If the diversion process is utilized pursuant to this subsection, then statements made by a juvenile in a diversion proceeding shall be inadmissible at an adjudicative proceeding on the underlying charge as substantive evidence of guilt.</u> If community service is going to be utilized pursuant to this subsection, the prosecuting attorney shall collect a fee of sixty cents (60¢) per hour for each hour of community service work the juvenile is going to perform and remit the fee to the state insurance fund for the purpose of securing worker's compensation insurance for the juvenile offender performing community service. However, if a county is self-insured and provides worker's compensation insurance for persons performing community service pursuant to the provisions of this chapter, then remittance to the state insurance fund is not required.

(2) After the petition has been filed and where, at the admission or denial hearing, the juvenile offender admits to the allegations contained in the petition, the court may decide to make an informal adjustment of the petition. Informal adjustment includes, but is not limited to:

(a) Reprimand of the juvenile offender;

(b) Informal supervision with the probation department;

(c) Community service work;

(d) Restitution to the victim;

(e) Participation in a community-based diversion program.

(3) Information uniquely identifying the juvenile offender, the offense, and the type of program utilized shall be forwarded to the department. This information shall be maintained by the department in a statewide ju-

venile offender information system. Access to the information shall be controlled by the department, subject to the provisions of section 9-342, Idaho Code.

(4) Such informal adjustment of the petition shall be conducted in the manner prescribed by the Idaho juvenile rules. When an informal adjustment is made pursuant to this section and the juvenile offender is to perform community service work, the court shall assess the juvenile offender a fee of sixty cents (60¢) per hour for each hour of community service work the juvenile offender is to perform. This fee shall be remitted by the court to the state insurance fund for the purpose of securing worker's compensation insurance for the juvenile offender performing community service. However, if a county is self-insured and provides worker's compensation insurance for persons performing community service pursuant to the provisions of this chapter, then remittance to the state insurance fund is not required.

SECTION 2. That Section 20-514, Idaho Code, be, and the same is hereby amended to read as follows:

20-514. REPRESENTATION AT ALL STAGES OF PROCEEDINGS -- APPOINTMENT OF COUNSEL -- WAIVER -- PAYMENT OF COST OF LEGAL SERVICES. (1) A juvenile who is being detained by a law enforcement officer or who is under formal charge of having committed, or who has been adjudicated for commission of, an act, omission or status that brings him under the purview of this act, is entitled:

(a) To be represented by an attorney to the same extent as an adult having his own counsel is so entitled pursuant to section 19-852, Idaho Code; and

(b) To be provided with the necessary services and facilities of representation, including investigation and other preparation.

(2) A juvenile who is entitled to be represented by an attorney under subsection (1) of this section is entitled:

(a) To be counseled and defended at all stages of the matter beginning with the earliest time and including revocation of probation or recommitment;

(b) To be represented in any appeal; and

(c) To be represented in any other post-adjudication or review proceeding that the attorney or the juvenile considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.

(3) A juvenile's right to a benefit under subsection (1) or (2) of this section is unaffected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

(4) As early as possible in the proceedings, and in any event before the hearing of the petition on the merits, the juvenile and his parents, or guardian, shall be notified of their right to have counsel represent them. When it appears to the court that the juvenile or his parents or guardian desire counsel but are financially unable to pay for such legal services, the court shall appoint counsel to represent the juvenile and his parents or guardian; provided that in the event the court shall find that there is a conflict of interest between the interests of the juvenile and his parents

or guardian, then the court shall appoint separate counsel for the juvenile, whether or not he or his parents or guardian are able to afford counsel, unless there is an intelligent waiver of the right of counsel by the juvenile, except as provided in subsection (6) of this section, and the court further determines that the best interest of the juvenile does not require the appointment of counsel. Counsel appointed under this section shall initially receive reasonable compensation from the county and the county shall have the right to be reimbursed for the cost thereof by the parents or guardian as hereafter provided in this section.

(5) Any waiver of the right to counsel by a juvenile under this act shall be made in writing, on the record and upon a finding by the court that:

(a) The juvenile has been informed of the right to counsel and the dangers and disadvantages of self-representation; and

(b) The waiver is intelligently made after consideration of the totality of the circumstances including, but not limited to:

(i) The age, maturity, intelligence, education, competency and comprehension of the juvenile;

(ii) The presence of the juvenile's parents or guardian;

(iii) The seriousness of the offense;

(iv) The collateral consequences of adjudication of the offense; and

(v) Whether the interests of the juvenile and his parents or guardian conflict.

(6) A juvenile shall not be permitted to waive the assistance to counsel in any of the following circumstances:

(a) If the juvenile is under the age of fourteen (14) years;

(b) In sentencing proceedings in which it has been recommended that the juvenile be committed to the legal custody of the department of juvenile corrections;

(c) In proceedings in which the juvenile is being adjudicated for commission of a crime of a sexual nature;

(d) In proceedings in which the juvenile is being adjudicated for commission of a felony;

(e) In hearings upon a motion to waive jurisdiction under the juvenile corrections act pursuant to section 20-508, Idaho Code;

(f) In hearings upon a motion to examine the juvenile to determine if he is competent to proceed pursuant to section 20-519A, Idaho Code; or

(g) In recommitment proceedings.

(~~2~~7) Upon the entry of an order finding the juvenile is within the purview of this act, t~~T~~he parents, spouse or other person liable for the support of the juvenile, or the estates of such persons, and the estate of such juvenile, ~~shall~~ may be ~~liable for the cost to the county of~~ required by the court to reimburse the county for all or a portion of the cost of those legal services rendered to the juvenile by counsel appointed pursuant to this section~~, unless the court finds such persons to be needy persons and financially unable to pay the cost of such legal services~~ that are related to the finding that the juvenile is within the purview of this act, unless the court finds such persons or estate to be indigent as defined in section 19-851(c), Idaho Code, and the requirement would impose a manifest hardship on those persons responsible for the juvenile or the estates. The current inability of those

persons or entities to pay the reimbursement shall not, in and of itself, restrict the court from ordering reimbursement.

(~~3~~8) The prosecuting attorney of each county may, on behalf of the county, recover payment or reimbursement, as the case may be, from each person or estate who is liable for the payment or reimbursement of the cost of court appointed counsel for the juvenile, ~~his parents or guardian under this~~ as provided in subsection (7) of this section. In the event such payment or reimbursement is not made upon demand by the prosecuting attorney, suit may be brought against such persons by the prosecuting attorney within five (5) years after the date on which such counsel was appointed by the court.

Figure 1: Waiver Requirements

	Guilty Plea Context	Trial Context
Constitutional Requirements	-Per *Tovar*, defendants need to be informed of: • the nature of the charges against them; • their right to be counseled regarding their plea; and • the range of allowable punishments attendant upon the entry of a guilty plea	-Per *Faretta*, in determining whether a defendant waived his or her right to counsel "voluntarily and intelligently," the court should consider : • literacy of the defendant; • competency of the defendant; • understanding of the defendant; • whether or not the defendant's decision is made with free will -Per *Faretta*, the defendant *should* be made aware of the "dangers and disadvantages of self-representation." -Per *Patterson*, the "dangers and disadvantages of self-representation" referred to in *Faretta* which "must" be rigorously conveyed to the defendant, include that counsel can assist in: • applying proper rules of evidence; • applying proper rules of procedure; • voir dire; • direct and cross examination of witnesses; and • objecting to improper questioning
Idaho Requirements	-Per I.C. §19-857, in determining whether a defendant acted with "full awareness" of his or her rights and the "consequences of waiver," courts shall consider such factors as: • the defendant's age; • the defendant's education; • the defendant's familiarity with the English language; and • the complexity if the crime involved	Per I.C. §19-857, in determining whether a defendant acted with "full awareness" of his or her rights and the "consequences of waiver," courts shall consider such factors as: • the defendant's age; • the defendant's education; • the defendant's familiarity with the English language; and • the complexity if the crime involved -Per *Hoppe*, *Lankford*, *Dalrymple*, and *McCabe*, a defendant's waiver of counsel must be "voluntary and intelligent." -Per *Lovelace*, a defendant must be made aware of: • nature of the charges; • possible penalties associated with the charges; and • the inherent risks involved in waiving right to counsel

Figure 2: Survey Data

County	Attorneys[1]	Budget[2]	Felony[3]	Misdemeanor[4]	Juvenile[5]	MHC[6]	CP[7]	Total Cases
Ada	41	$6,226,044	2,301	10,029	1,148	672	164	14,314
Bannock	8	$691,612	342	2,110	275	136	39	2,902
Benewah	1.5	$112,200	28	109	9	6	16	168
Bingham	4	$220,236	261	1,347	220	63	52	1,943
Boise	3	$47,296	33	404	24	9	2	472
Bonner	4	$522,108	166	686	60	33	16	961
Boundary	3	$93,676	/	79	5	3	7	94
Camas	1	$13,200	1	12	2	1	1	17
Canyon	18	$2,000,000	1,086	6,327	658	122	149	8,342
Caribou	0.5	$40,000	13	106	7	/	/	126
Cassia/Mini.	4.5	$416,775	360	1,229	267	10	32	1,898
Clark	1.5	$4,799	4	2	/	/	/	6
Clearwater	3	$134,633	116	471	121	5	35	748
Custer	/	$61,750	13	172	20	6	/	211
Elmore	3.5	$416,981	96	426	57	9	5	593
Gooding	/	$275,062	52	640	78	15	10	795
Kootenai	13	$1,936,123	596	2,346	423	/	173	3,538
Latah	2.5	$344,377	47	195	105	36	3	386
Lemhi	1	$71,207	20	89	5	13	15	142
Lewis	0.5	$40,000	22	93	12	/	2	129
Nez Perce	4	$503,460	285	1,274	115	20	29	1,723
Oneida	1	$30,000	/	/	/	/	/	/
Owyhee	1	/	40	156	23	5	10	234
Payette	2	$240,000	381	550	33	19	31	1,014
Power	1	$93,000	70	/	/	/	40	110
Shoshone	2.5	$193,919	114	1,007	43	8	18	1,190
Teton	/	$44,111	18	59	10	2	1	90
Twin falls	10	$1,011,676	500	2,070	471	85	77	3,203
Washington	3	$124,839	/	/	/	/	/	/
Mean	5.3	$568,182	268	1,230	168	58	39	1,680
Median	3	$164,276	83	449	57	12	17	593
Std. Dev.	8.4	$1,199,547	483	2221	266	142	51	3072

[1]Number of full-time-equivalent attorneys employed
[2]Total annual budget
[3]Total number of new felony cases
[4]Total number of new misdemeanor cases
[5]Total number of new juvenile cases
[6]Total number of new mental health cases
[7]Total number of new child protection cases

Figure 3: Cases Per Attorney

County	Felony	Misdemeanor	Juvenile	Mental Health	CP	Total Cases
Ada	56	244	28	16	4	349
Bannock	42	263	34	17	4	362
Benewah	18	72	6	4	10	112
Bingham	65	336	55	15	13	485
Boise	11	134	8	3	/	157
Bonner	41	171	15	8	4	240
Boundary	/	26	1	1	2	31
Camas	1	12	2	1	/	17
Canyon	60	351	36	6	/	463
Caribou	26	212	14	/	/	252
Cassia/Mini	80	273	59	2	7	421
Clark	2	1	/	/	/	4
Clearwater	38	157	40	1	11	249
Elmore	27	121	16	2	1	169
Kootenai	45	180	32	/	13	272
Latah	18	78	42	14	1	154
Lemhi	20	89	5	13	15	142
Lewis	44	186	24	/	4	258
Nez Perce	71	318	28	5	7	430
Owyhee	40	156	23	5	10	234
Payette	190	275	16	9	15	507
Power	70	/	/	/	40	110
Shoshone	45	402	17	3	7	476
Twin falls	50	207	47	8	7	320
Mean	44	178	24	7	9	259
Median	42	176	23	5	7	251
Std. Dev.	39	115	17	6	9	154

Figure 4: Comparisons

Least Funded[a]		Highest Caseloads[b]		Most Arrests[c]		Least Wealth[d]	
Bingham	117	Payette	507	Teton	85	Owyhee	$33,753
Payette	162	Bingham	485	Lemhi	69	Lemhi	$34,890
Bannock	172	Shoshone	476	Clark	46	Shoshone	$35,168
Caribou	209	Canyon	463	Owyhee	46	Washington	$36,152
Oneida	215	Nez Perce	430	Gooding	43	Gooding	$36,298
Nez Perce	223	Cassia/Mini.	421	Elmore	39	Benewah	$36,635
Clark	228	Bannock	362	Caribou	36	Power	$38,509
Cassia/Mini.	232	Ada	349	Latah	33	Boundary	$38,618
Canyon	242	Twin falls	320	Boundary	32	Lewis	$38,737
Kootenai	252	Kootenai	272	Oneida	30	Latah	$38,817
Bonner	253	Lewis	258	Benewah	28	Canyon	$39,457
Boundary	276	Caribou	252	Lewis	28	Clearwater	$39,800
Power	302	Clearwater	249	Washington	27	Twin falls	$41,194
Lewis	303	Bonner	240	Power	25	Cassia/Mini	$41,220
Latah	306	Owyhee	234	Bingham	24	Bonner	$41,270
Shoshone	324	Elmore	169	Twin falls	24	Clark	$41,580
Twin falls	325	Boise	157	Cassia/Mini.	23	Custer	$41,773
Washington	331	Latah	154	Ada	22	Elmore	$41,922
Clearwater	345	Lemhi	142	Clearwater	22	Nez Perce	$42,989
Benewah	348	Benewah	112	Shoshone	21	Oneida	$43,057
Ada	353	Power	110	Bannock	20	Bingham	$43,262
Teton	370	Boundary	31	Bonner	19	Bannock	$44,451
Elmore	605	Camas	17	Kootenai	18	Payette	$45,974
Lemhi	624	Clark	4	Nez Perce	17	Kootenai	$47,196
Gooding	766	Custer	/	Payette	15	Camas	$47,758
Camas	1015	Gooding	/	Boise	/	Boise	$49,056
Boise	/	Oneida	/	Camas	/	Caribou	$51,060
Custer	/	Teton	/	Canyon	/	Ada	$53,828
Owyhee	/	Washington	/	Custer	/	Teton	$57,999

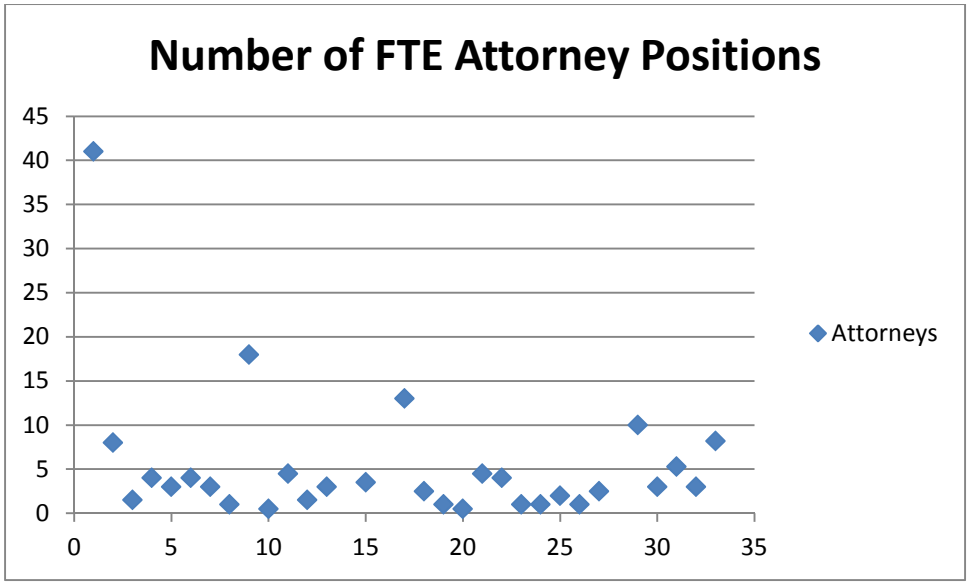
[a]**Number of dollars in public defense budget per arrest**

[b]**Total number of cases per full-time attorney**

[c]**Number of arrests per capita**

[d]**Median household income**

Figure 5: Variable Dispersion



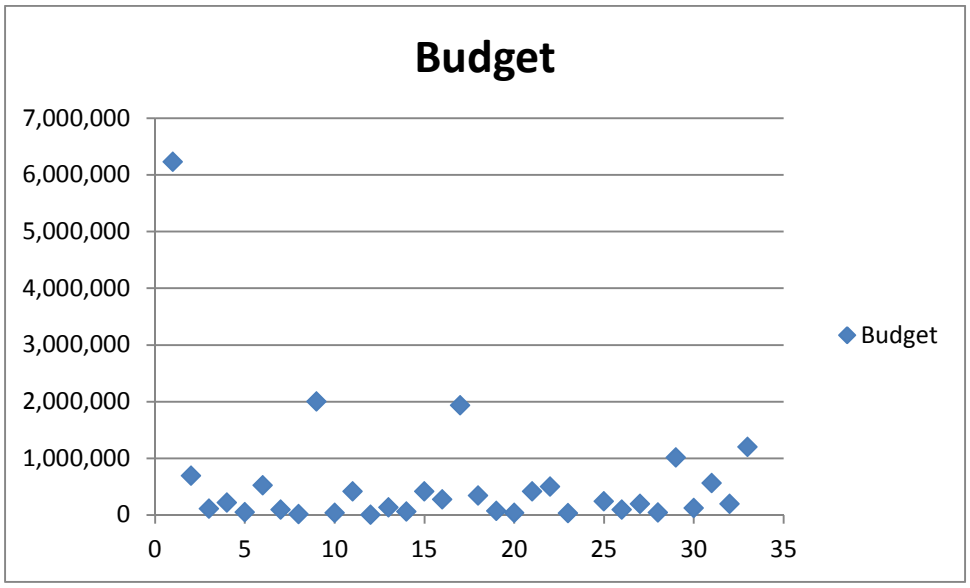
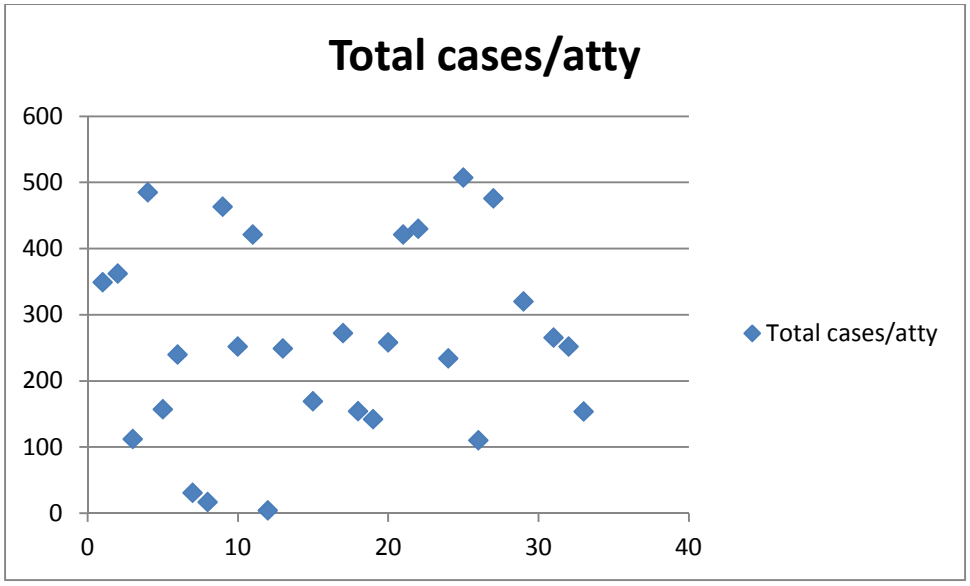


Figure 6: Variable Dispersion



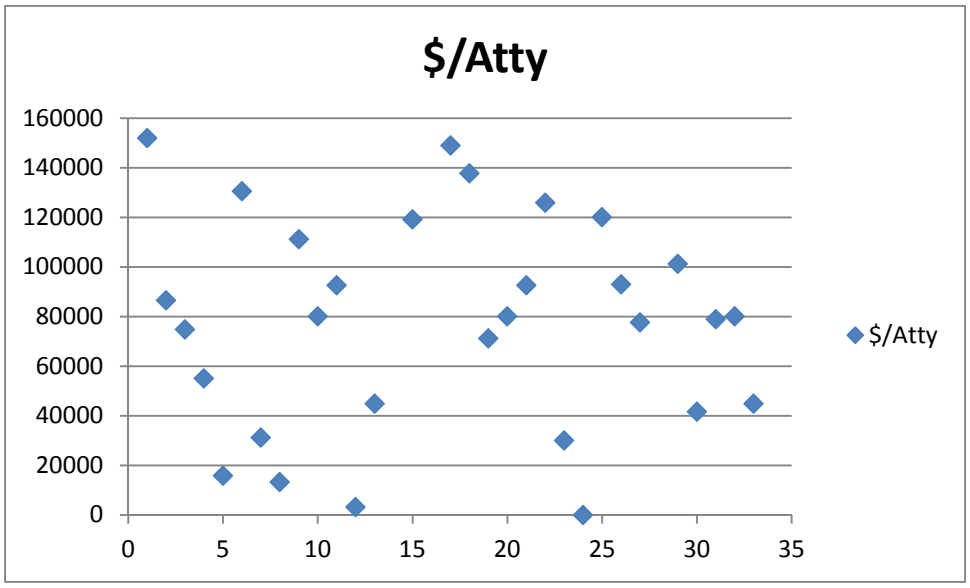


Figure 7: Budget Projection

Public Defense Commission
OPERATING BUDGET

BY OBJECT OF EXPENDITURE		
Personnel Costs		
Salary	102,100[1]	
Benefits	39,500[2]	
Subtotal:		141,600
Operating Expenditures		
Communication Costs	1,960	
Employee Development Costs	1,162	
General Services	2,660	
Professional Services	12,282	
Repair & Maintenance Services	1,410	
Administrative Services	2,866	
Computer Services	2,972	
Employee Travel Costs	10,048	
Administrative Supplies	1,496	
Computer Supplies	1,616	
Repair & Maintenance Supplies	90	
Insurance	130	
Rentals & Operating Leases	6,958	
Miscellaneous Expenditures	4,874	
Subtotal:		50,524[3]
Capital Outlay		
Computer Equipment		
Office Equipment		
Subtotal:		10,000
Lump Sum		0
Trustee/Benefit		0
Total:		**202,124**
Full-Time Positions (FTP)	2.0	

[1] One Administrative Assistant 2 position ($32,200 annually) and one Executive Director position ($69,900 annually—average of 7 boards—State Board of Accountancy, Board of Veterinary Medicine, Commission on the Arts, Outfitters and Guides, Real Estate Commission, State Board of Medicine, and State Board of Dentistry).

[2] One Administrative Assistant 2 position ($15,600 annually) and one Executive Director position ($23,900 annually).

[3] With the exception of travel costs (see Figure 11), this preliminary figure is an estimate based on the FY2011 operating expenditures of 23 of Idaho's smallest agencies. Each summary object level was estimated by calculating the sample's average after controlling for FTPs and removing extreme outliers. The 23 agencies are: Office of State Board of Education, Commission on Hispanic Affairs, Racing Commission, Commission on Aging, Commission on Arts, State Appellate Public Defender, Office of Drug Policy, Endowment Fund Investment Board, Soil & Water Conservation Commission, Board of Tax Appeals, Public Utilities Commission, Historical Society, Idaho Commission on Libraries, Idaho State Lottery, Commission on Blind and Visually Impaired, Office of Energy Resources, Division of Financial Management, Office of the Governor, Division of Human Resources, Office of Species Conservation, Lieutenant Governor, Secretary of State, and State Treasurer.

Figure 8: Travel Expense Projections for Commission Members[1]

Expense Category	Allowable Expense	PDC Estimate
Compensation	50.00/ day[2]	2,200[3]
Meals	30.00 / day	1,320[4]
Mileage	55.5 ¢ / mile	5,328[5]
Lodging	Actual Cost	1,200[6]
		Total = 10,048

[1] Projections are based on allowable honorariums or compensation for members of boards, commissions and councils pursuant to I.C. §59-509 (h). See Figure 12 for a summary of the different options.

[2] Compensation, meals, mileage, and lodging allowance figures are based on the State Board of Examiners' Policy and Procedures, effective as amended July 1, 2012. I.C. §67-2008.

[3] Compensation estimate—11 members x 4 meetings x 50 = 2,200

[4] Meals estimate—11 members x 4 meetings x 30 = 1,320

[5] Mileage estimate—600 roundtrip miles x 4 members x 4 meetings x .555 = 5,328

[6] Lodging—4 members x 4 meetings x 75 = 1,200

Figure 9: Indigent Defense Attorneys by County, 2012

Ada	COUNTY PD OFFICE
Adams	Tim Felton
Bannock	COUNTY PD OFFICE
Bear Lake	Steve Wuthrich
Benewah	Will Butler
Bingham	Tevor Castleton, Manuel Murdoch, & Cindy Campbell
Blaine	Cheri Hicks, Doug Werth, Keith Roark, Dan Dolan, & Chris Simms
Boise	David Smethers
Bonner	COUNTY PD OFFICE
Bonneville	COUNTY PD OFFICE
Boundary	Michael Waldrup
Butte	Cindy Campbell
Camas	Dan Dolan
Canyon	Mark Mimura
Caribou	Don Marler & Jim Aldrich
Cassia	COUNTY PD OFFICE
Clark	Todd Erikson
Clearwater	Chuck Kovis, Chris Lamont, & Deb McCormick
Custer	David Cannon
Elmore	Terry Ratliff
Franklin	Don Marler
Fremont	Paul Butikofer
Gem	Mark Mimura
Gooding	Phil Brown
Idaho	Greg Dickison
Jefferson	Paul Butikofer
Jerome	Jeremy Pittard & Stacy Gosnell-Taylor
Kootenai	COUNTY PD OFFICE
Latah	Chuck Kovis, Deb McCormick, & Ashley Rokyta
Lemhi	Fred Snook
Lewis	Mike Wasko
Lincoln	David Haley
Madison	Jim Archibald
Minidoka	COUNTY PD OFFICE
Nez Perce	Joanna McFarland, Rick Cuddihy, Danny Radakovich, & Rob Kwate
Oneida	Bob Eldredge
Owyhee	William Wellman
Payette	Phillip Heersink & Kelly Whiting
Power	Bob Eldredge
Shoshone	Eric Smith, Michael Peacock, & Connie Sparks
Teton	Farren Eddins
Twin Falls	COUNTY PD OFFICE
Valley	Scott Erekson
Washington	Shane Darrington & Tim Felton

Figure 10: Idaho's Most Common Offenses, 2010

§49-1232 §49-1229	Proof of Liability Insurance Required Motor Vehicle Insurance	First offense—Infraction; Second or subsequent offense within 5 years—Misdemeanor, up to 6 months jail	7779
§49-301	Drivers to be licensed	Misdemeanor, up to 6 months jail (via §49-236/§18-113)	7454
§18-8001	Driving Without Privileges	First offense—Misdemeanor, 2 to 180 days jail mandatory	6897
§37-2734A	Paraphernalia	Misdemeanor—up to 6 months jail	5520
§19-3901A	FTA Misdemeanor	Misdemeanor—up to 6 months jail, via §18-113	3491
§18-2403 §18-2407	Petit Theft	Misdemeanor—up to 1 year jail, via §18-2408	3281
§23-949	Minor in Possession of Alcohol	First offense—Misdemeanor, $1,000 fine only Second Offense—Misdemeanor, up to 30 days jail	1755
§18-1801	Criminal Contempt	Misdemeanor, up to 6 months jail, via §18-113	1337
§23-505	Unlawful Transportation/ Open Container	Infraction for passenger; Misdemeanor for individual in "actual physical control," up to 6 months jail, via §18-113	885
§18-6409	Disturbing the Peace	Misdemeanor, up to 6 months jail, via §18-113	1286
§39-5703	Possession of Tobacco by a Minor	Misdemeanor, up to 6 months jail	991
§23-604	Minor in Possession of Alcohol	First offense—Misdemeanor, $1,000 fine only Second offense—Misdemeanor, up to 30 days jail	871
§49-331	Unlawful Use of Driver's License	Misdemeanor, up to 6 months jail , via §49-236/§18-113	349
§49-1426	Pedestrian Under the Influence	Misdemeanor, up to 6 months jail, via §49-236/§18-113	240

Figure 11: 2012 Poverty Guidelines for the 48 Contiguous States and the District of Columbia

Persons in family/household	Poverty guideline	187%
1	$11,170	$20,888
2	$15,130	$28,293
3	$19,090	$35,698
4	$23,050	$43,104
5	$27,010	$50,509
6	$30,970	$57,914
7	$34,930	$65,319
8	$38,890	$72,724

Source: *Federal Register*, Vol. 77, No. 17, January 26, 2012, pp. 4034-4035

Figure 12

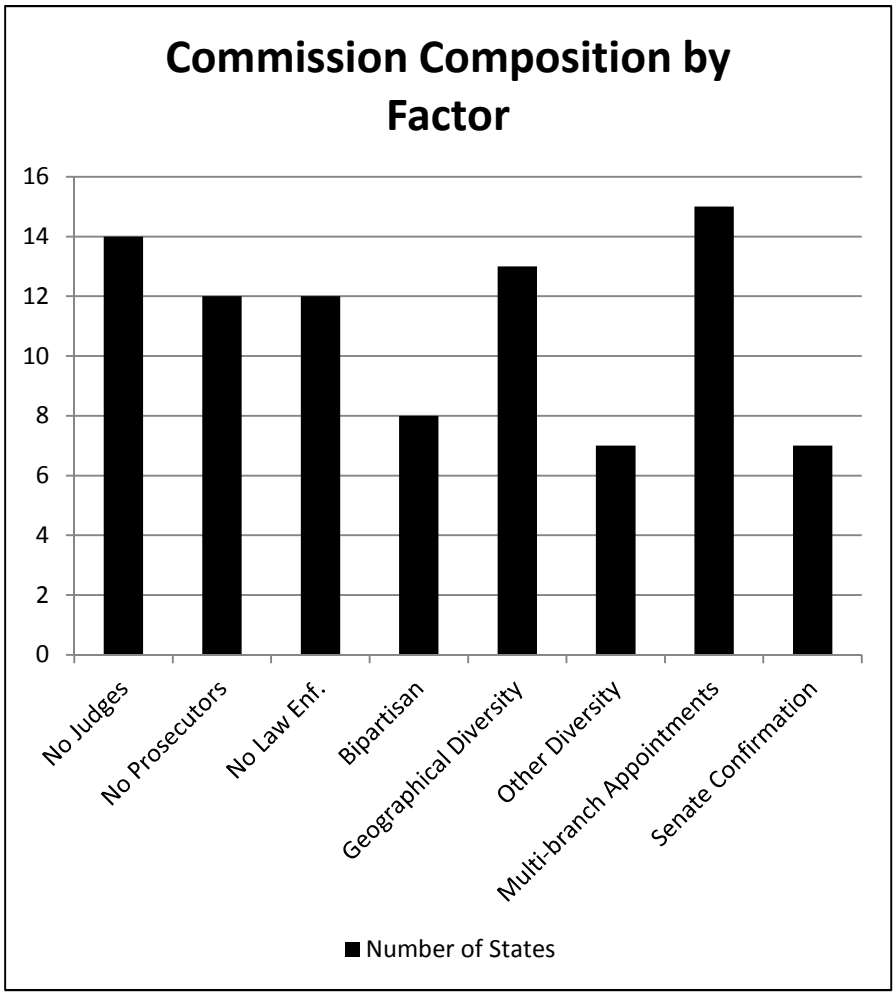

Commission Composition by Factor
16
14
12
10
8
6
4
2
0
No Judges
No Prosecutors
No Law Enf.
Bipartisan
Geographical Diversity
Other Diversity
Multi-branch Appointments
Senate Confirmation
Number of States

Figure 13: Commission Membership by State

State	Law Enforcement	Judges	Political Membership
Arkansas Ark. Code Ann. § 16-87-202(b)		1 county judge, 1 trial judge who hears criminal cases	No more than two members may be residents of the same congressional district, and no more two members be residents of the same county.
Colorado Colo. Rev. Stat. § 21-1-101	No member of the commission shall be at any time a judge, prosecutor, or employee of a law enforcement agency.	No member of the commission shall be at any time a judge, prosecutor, public defender, or employee of a law enforcement agency	No more than three may be from the same political party
Connecticut Conn. Gen. Stat. § 51-289(a)		Two judges of the Superior Court, or a judge of the Superior Court and any one of the following: A retired judge of the Superior Court, a former judge of the Superior Court, a retired judge of the Circuit Court, or a retired judge of the Court of Common Pleas	The speaker of the House, the president pro tempore of the Senate, the minority leader of the House and the minority leader of the Senate shall each appoint one member. Not more than three of the members, other than the chairman, may be members of the same political party.
Georgia Ga. Code Ann. § 17-12-3(c)	The appointing authorities shall not appoint a prosecuting attorney, any employee of a prosecuting attorney's office, or an employee of the Prosecuting Attorneys' Council.		The Governor shall appoint three county commissioners who have been elected and are serving as members of a county governing authority. The county commissioner council members appointed by the Governor shall be from different geographic regions and appointing authorities shall seek to identify and appoint persons who represent a diversity of backgrounds and experience.
Hawaii Haw. Rev. Stat. § 802-9			There shall be at least one member from each of the counties.
Illinois Ill. Comp. Stat. § 105/4(a)			A chairman appointed by the Governor, one member appointed by the Supreme Court, one member appointed by each of the 5 Appellate Courts, one member appointed by the Supreme Court from a panel of 3 persons nominated by the Illinois State Bar Association, one member appointed by the Governor from a panel of 3 persons nominated by the Illinois Public Defender Association.
Indiana Ind. Code § 33-40-5-2	No member may be a law enforcement officer or a court employee.	No member may be a law enforcement officer or a court employee.	Three members appointed by the governor, with not more than two belonging to the same political party; three members appointed by the chief justice of the supreme court, with not more than two belonging to the same political party; two members of the house of representatives appointed by the speaker of the house of representatives, who may not be from the same political party; and two members of the senate, appointed by the president pro tempore of the senate, who may not be from the same political party.
Kansas Kan. Stat. Ann. §22-4519(c)	No member of the board shall be, or shall be employed by, a law enforcement officer.	No member of the board shall be, or shall be employed by, a judicial officer.	Nine members appointed by the governor, subject to confirmation by the senate; two members from the first congressional district, of whom one shall be a lawyer registered with the Kansas supreme court; and at least one member from each other congressional district in the state. No more than five members of the board shall be from the

Figure 13: Commission Membership by State

State	Law Enforcement	Judges	Political Membership
			same political party.
Kentucky Ky. Rev. Stat. Ann. § 31.015(1)(a)	No member shall be a prosecutor or law enforcement official	No member shall be a judge.	Two members appointed by supreme court and seven by the governor.
Louisiana La. Rev. Stat. Ann. § 15:146B	No person shall be appointed to the board that has received compensation to be a prosecutor or law enforcement official, or employees of all such persons, within a two-year period prior to appointment.	No person shall be appointed to the board that has received compensation to be an elected judge or judicial officer, or employees of all such persons, within a two-year period prior to appointment.	To the extent practicable, the board shall be comprised of members who reflect the racial and gender makeup of the general population of the state, and who are geographically representative of all portions of the state. The governor shall appoint two members and shall designate the chairman. The chief justice of the Supreme Court shall appoint two members. The president of the Senate and the speaker of the House of Representatives shall each appoint one member. All appointments to the board shall be subject to confirmation by the Senate.
Maryland Md. Crim. Pro. Code Ann. § 16-301(c)	No member may be a current member or employee of a law enforcement agency, an attorney of a county or municipal corporation, the Attorney General, or the State Prosecutor.	No member may be a current member or employee of the Judicial Branch.	11 members shall be appointed by the Governor with the advice and consent of the Senate and shall include a representative of each judicial circuit of the State. One member shall be appointed by the President of the Senate. One member shall be appointed by the Speaker of the House of Delegates.
Massachusetts Mass. Gen. Laws ch. 211D. § 1	The committee shall not include presently serving elected state, county or local officials, district attorneys, or state or local law enforcement officials.	The committee shall not include presently serving judges.	2 members shall be appointed by the governor; 2 shall be appointed by the president of the senate; 2 shall be appointed by the speaker of the house of representatives; and 9 shall be appointed by the justices of the supreme judicial court.
Michigan (pending)	Persons receiving compensation through the state or any local system for providing representation to or prosecution of indigent defendants in state courts shall not serve.	No more than 3 sitting or retired judges shall serve on the Commission at one time.	2 members from a list of 6 names submitted by the Speaker of the House of Representatives; 2 members from a list of 6 names submitted by the Majority Leader of the Senate; 1 member from a list of 3 names submitted by the Chief Justice of the Supreme Court; 2 members from a list of 6 names submitted by the Criminal Defense Attorney Association; 1 member from a list of 3 names submitted by the Judges Association; 1 member from a list of 3 names submitted by the District Judges Association, 1 member from a list of 3 names submitted by the State Bar; 1 member from names submitted by bar associations whose primary mission or purpose is to advocate for minority interests; 1 member selected by the Governor from the general public; 1 member selected by the Governor from local government; and the Chief Justice of Supreme Court, or his or designee.
Minnesota Minn. Stat. § 611.215(a)	No member may be employed as a prosecutor.	No member may be a judge.	Four attorneys admitted to the practice of law, well acquainted with the defense of persons accused of crime, appointed by the Supreme Court and three public members appointed by the governor. Appointments shall include qualified women and members of

Figure 13: Commission Membership by State

State	Law Enforcement	Judges	Political Membership
			minority groups. At least three members of the board shall be from judicial districts other than the First, Second, Fourth, and Tenth Judicial Districts.
Missouri Mo. Rev. Stat. § 600.015.1			Four members shall be lawyers, appointed by the governor with the advice and consent of the senate. No more than four members shall be of the same political party.
Montana Mont. Code Ann. § 2-15-1028(2)	While serving, a member may not serve as a county attorney or a deputy county attorney, the attorney general or an assistant attorney general, the United States district attorney or an assistant United States district attorney, or a law enforcement official.	While serving, a member may not serve as a judge.	Eleven members appointed by the governor including two attorneys from nominees submitted by the supreme court; three attorneys from nominees submitted by the president of the state bar; two members of the general public who are not attorneys or judges, active or retired (one member from nominees submitted by the president of the senate and one member from nominees submitted by the speaker of the house); one person who is a member of an organization that advocates on behalf of indigent persons; one person who is a member of an organization that advocates on behalf of a racial minority population; one person who is a member of an organization that advocates on behalf of people with mental illness and developmental disabilities; and one person who is employed by an organization that provides addictive behavior counseling.
Nebraska Neb. Rev. Stat. § 29-3924	No member shall be at the time of selection, or at any time during the term of office, a prosecutor, law enforcement official, or judge.	No member shall be at the time of selection, or at any time during the term of office, a judge.	Nine members appointed by the Governor from a list of attorneys submitted by the executive council of the State Bar Association after consultation with the board of directors of the Criminal Defense Attorneys Association. A member shall be appointed from each of the six Supreme Court judicial districts, and three members shall be appointed at large. The executive council of the Bar Association shall ensure that the selection process promotes appointees who are independent from partisan political influence. All members shall be committed to the principle of providing indigent defense services and civil legal services to low-income persons free from unwarranted judicial or political influence.
North Carolina N.C. Gen. Stat. § 7A-498.4(b)	No active prosecutors or law enforcement officials, or active employees of such persons, may be appointed to serve.		The Chief Justice of the Supreme Court shall appoint one member, who shall be an active or former member of the state judiciary. The Governor shall appoint one member, who shall be a non-attorney. The General Assembly shall appoint one member, who shall be an attorney, upon the recommendation of the President Pro Tempore of the Senate. The General Assembly shall appoint one member,

Figure 13: Commission Membership by State

State	Law Enforcement	Judges	Political Membership
			who shall be an attorney, upon the recommendation of the Speaker of the House of Representatives. The Public Defenders Association shall appoint a member, who shall be an attorney. The State Bar shall appoint one member, who shall be an attorney. The Bar Association shall appoint one member, who shall be an attorney. The Academy of Trial Lawyers shall appoint one member, who shall be an attorney. The Association of Black Lawyers shall appoint one member, who shall be an attorney. The Association of Women Lawyers shall appoint one member, who shall be an attorney. Three members shall reside in different judicial districts from one another. One appointee shall be a non-attorney, and one appointee may be an active member of the judiciary. One appointee shall be Native American.
North Dakota N.D. Cent. Code §54-61-01(2)	Membership may not include any individual, or the employee of that individual, who is actively serving as a state's attorney, assistant state's attorney, or law enforcement officer.	Membership may not include any individual, or the employee of that individual, who is actively serving as a judge.	Two members appointed by the governor, one of whom must be appointed from a county with a population of not more than ten thousand. Two members of the legislative assembly, one from each house, appointed by the chairman of the legislative management. Two members appointed by the chief justice of the supreme court, one of whom must be appointed from a county with a population of not more than ten thousand. One member appointed by the board of governors of the state bar association of North Dakota.
Ohio Ohio Rev. Code Ann. § 120.01			The chairman shall be appointed by the governor with the advice and consent of the senate. Four members shall be appointed by the governor, two of whom shall be from each of the two major political parties. Four members shall be appointed by the supreme court, two of whom shall be from each of the two major political parties.
Oklahoma Okla. Stat. tit. 22, § 1355.1			Five members appointed by the Governor with the advice and consent of the Senate. At least three members shall be attorneys licensed to practice law in the State of Oklahoma who have experience through the practice of law in the defense of persons accused of crimes. The Governor shall designate one member to serve as chair. No congressional district shall be represented by more than one member on the Board. No county shall be represented by more than one member.
Oregon Or. Rev. Stat. Ann. §151.213(2)	A member may not serve concurrently as a judge, a prosecuting attorney or an employee of a law enforcement	Except for the Chief Justice or a senior judge, a member may not serve concurrently as a judge, a prosecuting attorney or an employee of a law	Seven members appointed by order of the Chief Justice. In addition to the seven appointed members, the Chief Justice serves as a nonvoting, ex

Figure 13: Commission Membership by State

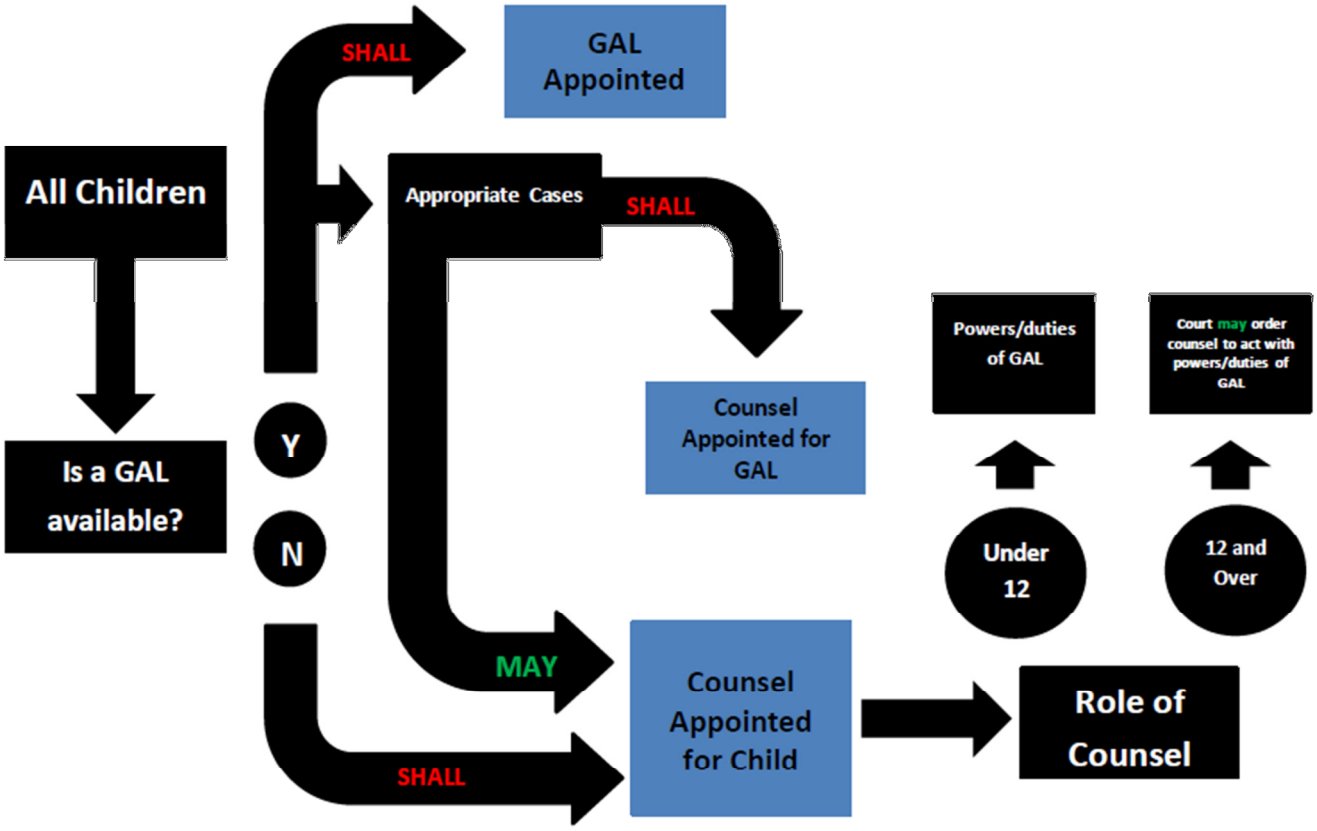
State	Law Enforcement	Judges	Political Membership
	agency.	enforcement agency.	officio member. The Chief Justice shall appoint at least two persons who are not bar members, at least one person who is a bar member and who is engaged in criminal defense representation and at least one person who is a former state prosecutor.
South Carolina S.C. Code Ann. § 17-3-310(B).			One member from each of the four judicial regions of the State appointed by the governor upon recommendation of the Public Defender Association. A member of the Bar whose practice is principally in family law, two members of the Bar whose practice is principally in criminal defense, and two members of the Bar whose practice is principally neither criminal defense nor family law. Two members appointed by the Chief Justice of the Supreme Court, one of whom must be a retired circuit court judge and one of whom must be either a retired family court judge or a retired appellate court judge. The Chairmen of the Senate and House Judiciary Committees, or their legislative designees.
Texas Tex. Govt. Code Ann. §§ 79.013 & 79.014			Eight ex officio members and five appointive members. The ex officio members are the chief justice of the supreme court, the presiding judge of the court of criminal Appeals, one of the members of the senate serving who is designated by the lieutenant governor, a member of the house of representatives appointed by the speaker of the house, one of the courts of appeals justices who is designated by the governor, one of the county court or statutory county court judges who is designated by the governor, one other member of the senate appointed by the lieutenant governor, and the chair of the House Criminal Jurisprudence Committee. The governor shall appoint with the advice and consent of the senate one member who is a district judge serving as a presiding judge of an administrative judicial region, one member who is a judge of a constitutional county court or who is a county commissioner, one member who is a practicing criminal defense attorney, one member who is a chief public defender or the chief public defender 's designee, and one member who is a judge of a constitutional county court or who is a county commissioner of a county with a population of 250,000 or more. In making appointments to the board, the governor shall attempt to reflect the geographic and demographic diversity of the state.
Virginia			The chairmen of the House and Senate

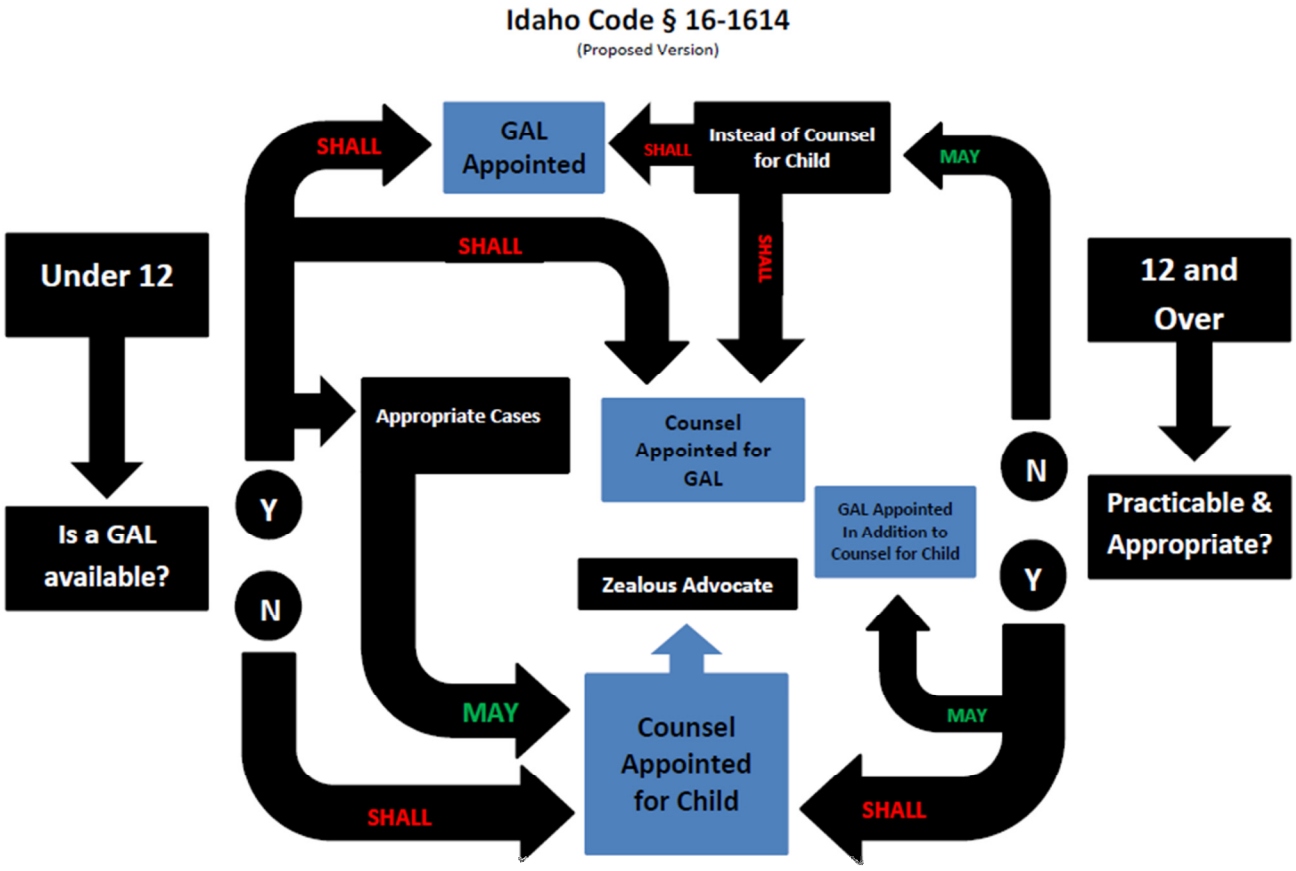
Figure 13: Commission Membership by State

State	Law Enforcement	Judges	Political Membership
Va. Code Ann. § 19.2-163.01(A).			Committees for Courts of Justice or their designee, the chairman of the State Crime Commission or his designee, the Executive Secretary of the Supreme Court or his designee, two attorneys officially designated by the State Bar, two persons appointed by the Governor, three persons appointed by the Speaker of the House of Delegates, and three persons appointed by the Senate Committee on Rules.
Washington Wash. Rev. Code § 2.70.030(1)	No appointee may serve as a prosecutor or prosecutor employee.	No appointee may serve as a judge, except on a pro tem basis, or as a court employee.	Three persons appointed by the chief justice of the supreme court, who shall also appoint the chair of the committee. Two non-attorneys appointed by the governor. Two senators, one from each of the two largest caucuses, appointed by the president of the senate, and two members of the house of representatives, one from each of the two largest caucuses, appointed by the speaker of the house of representatives. One person appointed by the court of appeals executive committee. One person appointed by the Washington state bar association. One person appointed by the Washington state counties. One person appointed by the association of cities.

Idaho Code § 16-1614

(Current Version)




Idaho Code § 16-1614
(Proposed Version)
Under 12
Is a GAL available?
Y
N
SHALL
GAL Appointed
Appropriate Cases
MAY
SHALL
Counsel Appointed for Child
SHALL
Instead of Counsel for Child
SHALL
Counsel Appointed for GAL
Zealous Advocate
GAL Appointed In Addition to Counsel for Child
MAY
SHALL
MAY
N
Y
12 and Over
Practicable & Appropriate?

Sample Definitions of "Case"

National Advisory Commission
A case is defined as a "single charge or set of charges concerning a defendant (or other client) in one court in one proceeding."[1]

National Center for State Courts and the Conference of State Court Administrators
"Count each defendant and all charges involved in a single incident as a single case."[2]

Nevada
"For felony, gross misdemeanor, and misdemeanor criminal cases, the unit of count is a single defendant on a single charging document (*i.e.*, one defendant on one complaint or information from one or more related incidents on one charging documents is one case, regardless of the number of counts)."[3]

Washington
"A case is defined as the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation. In courts of limited jurisdiction multiple citations from the same incident can be counted as one case."[4]

Nebraska
"The preferred method for defining and counting a case recommended by the National Center for State Courts is by a single defendant and a single incident; that is, count each defendant and all the charges arising from a single incident as one case. For example, if a defendant is arrested for driving under the influence and during the stop assaults the officer, both charges are counted as one case because they arise from one incident. With this method, the number of cases being counted is not dependent upon the number of filings (i.e. whether a prosecutor chooses to charge the case by separate filings for each charge or by one consolidated filing)."[5]

Texas
"The number of criminal cases reported . . . should be based on the number of defendants named in an indictment or information. That is: If a single indictment or information names more than one defendant, there is more than one case: as an example, if three defendants are named in one indictment, count this as three cases. If the same defendant is charged in more than one indictment or information, there is more than one case: as an example, if the same person is

[1] National Advisory Commission on Criminal Justice Standards and Goals, *Task Force on Courts*, 1973.
[2] National Center for State Courts and the Conference of State Court Administrators, *State Court Model Statistical Dictionary*, 1989. Note: This definition is most ubiquitous in the relevant indigent defense literature.
[3] Order at 5*, In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, Nevada Supreme Court, 2011.
[4] Washington State Bar Association, *Standards for Indigent Defense Services*, 2012.
[5] Nebraska Minority and Justice Task Force / Implementation Committee, *The Indigent Defense System in Nebraska: An Update*, 2004.

named in four separate indictments, count this as four cases. Finally, if an indictment or information contains more than one count, report this as one case."[6]

Ohio

"A single case includes all applicable proceedings when one defendant is charged or indicted for one offense or a series of offenses arising from a single event. A single case is also counted when one defendant is charged or indicted with offenses resulting from a series of events that occur in the course of one scheme of conduct happening over a period of time, regardless of the number of counts or charges. When there are multiple defendants charged with the same offense(s), whether tried separately or together, each defendant shall be counted as a separate case. Whenever a public defender office represents an individual charged with a felony at the preliminary hearing stage in county or municipal court, the preliminary hearing stage shall not be counted as a case, but rather shall be counted in the category 'Felonies filed in Municipal Court.' If the county public defender continues to represent the individual after the preliminary hearing stage, the common pleas court case shall be counted as a case. Once a case is closed, if it is later re-opened, it shall be counted as a separate case. When one defendant is charged with unrelated acts happening at separate times, each act or charge shall be counted as a separate case whether tried separately or together. When one defendant is charged with different counts from different court jurisdictions, the number of cases counted shall be equal to the number of jurisdictions (i.e. municipal, county, common pleas, juvenile division) in which the defendant is being charged. In abuse, dependency, neglect, parentage, non-support contempt, and visitation contempt court actions, a case shall be counted each time the court evokes its continuing jurisdiction. Unless there is a conflict, all children in an abuse, dependency or neglect court action shall be counted as a single case."[7]

[6] Office of Court Administration, Task Force on Indigent Defense, *Procedure Manual for the Indigent Defense Expenditure Report*, 2010.

[7] Ohio Public Defender, *Standards and Guidelines for Appointed Counsel Reimbursement*, Section III(E), 2000.

CERTIFICATION OF INDIGENCY

Pursuant to Idaho Code § 19-854

I. PERSONAL INFORMATION				
Defendant's Name	D.O.B.	Parent or Legal Guardian *(if Defendant is a juvenile)*		D.O.B.
Mailing Address		City	State	Zip Code
Social Security Number		Driver's License Number	Phone ( )	
Case No.		Work Phone ( )	Cell Phone ( )	

II. OTHER PERSONS LIVING IN HOUSEHOLD (including spouse)					
Name 1)	D.O.B	Relationship	Name 4)	D.O.B.	Relationship
2)			5)		
3)			6)		

III. PRESUMPTIVE ELIGIBILITY

Eligibility for the appointment of counsel is presumed if the defendant meets any of the qualifications below. Please place an 'X'

Medicaid: ____ Food Stamps: ____ WIC: ____ Incarcerated: ____ Committed to a Public Mental Health Facility: ____

IV. MONTHLY INCOME AND EMPLOYER			
	Defendant	Spouse	Total Income
Name & Address of Employer			
Gross Monthly Employment Income (prior to deductions)			$
Unemployment Insurance Benefits or Worker's Compensation			$
Child Support			$
SSI/SSD			$
Retirement/Pension			$
Other Income			$
		TOTAL MONTHLY INCOME	**$**

V. LIQUID ASSETS	
Type of Asset	**Value**
Checking, Savings, Money Market Accounts	$
Stocks, Bonds, CDs	$
Other Liquid Assets or Cash on Hand	$
Total Liquid Assets	**$**

VI. OTHER ASSETS			
Type of Asset	**Estimated Value**	**Balance on Loan**	**Equity**
Home or Other Real Property	$	$	$
Vehicle 1 (Year, Make, Model)	$	$	$
Vehicle 2 (Year, Make, Model)	$	$	$
Other Assets	$	$	$
		Total Equity	**$**

VII. MONTHLY EXPENSES				
Type of Expense	**Amount**		**Type of Expense**	**Amount**
Child Support	$		Telephone	$
Child Care	$		Car Payment	$
Auto Insurance	$		Taxes Withheld or Owed	$
Other Insurance	$		Credit Card Payments	$
Out of Pocket Medical or Dental Expenses	$		Other Loans	$
Rent / Mortgage Payment	$		Utilities (Gas, Electric, Water / Sewer, Trash)	$
Food	$		Court Fines	$
Educational Loans	$		Other (Specify)	$
EXPENSES	**$**		**EXPENSES**	**$**

VIII. AFFIDAVIT

I, _____(Defendant) being duly sworn, state:

1. I swear under penalty of perjury that the answers above are true and correct to the best of my knowledge.

2. I am financially unable to retain private legal representation without substantial financial hardship to me or my dependents.

3. I understand that I may be required to reimburse the county for all or a portion of the cost of the services provided by a court-appointed attorney upon disposition of my case so long as such requirement does not pose a manifest hardship.

4. I understand that I may be required to provide documentation in support of the information provided above.

5. I understand that information provided herein may not be used as substantive evidence of guilt in a criminal proceeding.

_____ _____
Affiant's signature Date

Notary Public / Individual duly authorized to administer oath:
Subscribed and duly sworn before me according to law, by the above named applicant this _____ day of _____, _____, at _____, County of _____, State of Idaho.

_____ _____
Signature of person administering oath Title (example: Notary, Deputy Clerk of Courts, etc.)

Determination of Indigency (for administrative purposes only)			
Total Household Monthly Income	$		
Total Household Monthly Expenses	$		
Monthly Disposable Income	**$**	**Total Equity in Assets**	**$**

IDAHO CRIMINAL JUSTICE COMMISSION

"Collaborating for a Safer Idaho"
Established 2005

C.L. "BUTCH" OTTER
Governor

August 8, 2011

Ms. Patti Tobias
Administrative Director of the Courts
P.O. Box 83720
Boise, ID 83720-0101

Dear Patti:

As you are aware, the Public Defense Subcommittee of the Idaho Criminal Justice Commission is looking at the issue of the state of public defense in Idaho.

One of the issues that is under consideration is the question of indigency and whether indigent criminal defendants can be required to reimburse the state for all or a portion of the cost of providing that defense. One of the subcommittee's primary concerns is how courts currently determine reimbursement obligations for the cost of public defense services pursuant to Idaho Code §19-854.

In some courts, the reimbursement obligation is set at the same time counsel is initially appointed. In addition to the chilling effect on an individual's right to request counsel, we are concerned about the constitutionality of setting a reimbursement obligation before disposition of the case and before the court has had the opportunity to consider such factors as the time counsel spent, the results obtained, and the financial situation of the defendant at the time of disposition.

The subcommittee received a letter in June 2011 that encouraged the subcommittee to review how indigency is determined and at what time, if any, an indigent defendant should be obligated to reimburse all or a part of the cost of providing the defense. The subcommittee is currently drafting proposed statutory amendments to address this problem. However, the subcommittee believes that this issue is particularly important and it should be addressed immediately. As such, we respectfully ask that all reimbursement obligations be set upon disposition and after the court has had an opportunity to consider the particulars of each case. It is our recommendation that notice should be sent to each of the

judges and trial court administrators regarding this issue and the training be provided to the courts at the earliest convenient time for the courts.

We, of course, thank you for your attention to this matter and for your support of our efforts. We also welcome any questions, comments, or concerns you may have.

Respectfully,

Daniel G. Chadwick

Daniel G. Chadwick
Chair, Public Defense Subcommittee

DGC:jh
By e-mail